In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Feb. 8, 1971—Naughten's petition for writ of habeas corpus filed in U.S. District Court for the District of Oregon.

Feb. 26, 1971—Cupp's return and motion to dismiss filed.

June 30, 1971—Parties waived an evidentiary hearing and agreed to submit the case on written briefs.

Nov. 4, 1971—Opinion and judgment order of District Court entered, dismissing petition.

Nov. 24, 1971—Naughten's notice of appeal filed.

May 24, 1972—Opinion and judgment of U.S. Court of Appeals for the Ninth Circuit entered, reversing District Court.

June 6, 1972—Cupp's petition for rehearing filed.

Jan. 18, 1973—Order on petition for rehearing entered, amending original opinion and denying petition for rehearing.

Feb. 20, 1973—Cupp's petition for writ of certiorari filed.

Feb. 26, 1973—Separate dissenting opinion of Chambers, C. J., filed.

April 23, 1973—Certiorari granted.

CAPTION OF THE CASE

The original petition for a writ of habeas corpus was filed in forma pauperis. The caption of the case, as ultimately fixed by the District Court, was as follows:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. 71-80
	)	
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

[Petition filed on form questionnaire in use in District Court. Instructions for completing omitted in printing.]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN O.S.P. # 33774
Full name and prison number (if any) of Petitioner

v.

STATE OF OREGON
Name of Respondent

Case No. Civ. 71-80

1. Place of detention—Oregon State Penitentiary
2. Name and location of court which imposed sentence —Circuit Court, Multnomah County, Portland, Oregon
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed: unknown
4. The date upon which sentence was imposed and the terms of the sentence: 15 years in O.S.P.—Sentenced May, 1969
5. [Finding of guilty was made after a plea of not guilty]
6. [Finding of guilty was made by a jury]
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i. Oregon State Court of Appeals

ii. Petitioned Ore. State Supreme Court for review

(b) the result in each such court to which you appealed:

i. Appeal denied (verdict of Circuit Court affirmed)

ii. Petition denied

(c) the date of each such result

i. July 9, 1970

ii. October 16, 1970[1]

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Kessler, 89 Adv Sh 55, — Or —, 458 P2d 432 (1969); State v. Blank, 90 Adv Sh 285, — Or App —, 464 P2d 836 (1970)

9. If you answered "no" to (7), state your reasons for not so appealing: X

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The circuit court erred in instructing the jury that every witness is presumed to speak the truth without an explanation of how this presumption can be overcome (when defendant does not take the stand or offer witnesses). An accused's presumption of innocence is negated if he calls no witnesses in his defense and the trial court instructs the jury that all witnesses are presumed to speak the truth

[1] Actually, petition for review was denied by Oregon Supreme Court on September 22, 1970.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) State v. Cathey, — Or App —, 89 Or Adv Sh 843, — Or —, — P2d — (1969)

State v. Kessler, — Or —, 458 P2d 432 (1969)

State v. Smith, — Or App —, 89 Or Adv Sh 185, — Or —, — P2d — (1969)

United States v. Bilotti, 380 F2d 649 (2nd Cir 1967)

United States v. Boone, 401 F2d 659 (3rd Cir 1968)

United States v. Meisch, 370 F2d 768 (3rd Cir 1966)

ORS 44.370

12. Prior to this petition, have you filed with respect to this conviction

(a) any petition in a State court under the Oregon Post-Conviction Hearing Act. ORS 138.510 to 138.680? No

(b) any petition in State or Federal courts for habeas corpus? No

13. [Inapplicable and therefore omitted in printing.]

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. The same grounds as stated in question 10 (A)

(b) the proceedings in which each ground was raised:

i. Appeal to Oregon state court of appeals.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: X

17. Were you represented by an attorney at any time during the course of
    (a) your arraignment and plea? Yes
    (b) your trial, if any? Yes
    (c) your sentencing? Yes
    (d) your appeal, if any? Yes
    (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list
    (a) the name and address of each attorney who represented you:
        i. Mr. Roderick Kitson, Portland, Oregon
        ii. Mr. Oscar Howlett, Portland, Oregon
        iii. J. Marvin Kuhn, Deputy Public Defender 110 Industries Bldg., Salem, Oregon
    (b) the proceedings at which each attorney represented you:
        i. Plea
        ii. Trial & sentencing
        iii. Appeal

19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions page 1 of this form)? Yes.

/s/ Hugh K. Naughten
Signature of Petitioner

[Jurat omitted in printing]

RETURN AND MOTION TO DISMISS

[Names of counsel omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN, Petitioner,	)	Civil No. 71-80
v.	)	RETURN AND MOTION TO DISMISS
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.	)	

Per order of the Court, dated February 8, 1971, that the respondent appear, state the cause of petitioner's detention, state whether or not petitioner's state remedies have been exhaused, and show cause why a Writ of Habeas Corpus should not issue, respondent states:

I

Hoyt C. Cupp should be substituted as the proper party respondent in the above-entitled case because he has the petitioner Hugh Kyle Naughten, in his custody pursuant to the following sentence orders:

1. From the Circuit Court of the State of Oregon for Multnomah County, dated May 6, 1969, on a verdict of guilty of Assault and Robbery Being Armed with a Dangerous Weapon, a 15-year sentence.

2. From the Circuit Court of the State of Oregon for the County of Marion, dated May 14, 1970, on a find-

ing of guilty of Burglary not in a Dwelling after trial without jury, a five-year sentence.

The aforesaid sentences have neither expired nor been terminated in any way. Copies of said sentence orders are attached hereto, marked Exhibits "1" and "2" respectively, and incorporated herein by this reference.

II

In his Petition for a Writ of Habeas Corpus, petitioner challenges only the conviction designated in the attached Exhibit 1. Petitioner's appeal from this conviction was affirmed July 9, 1970 by the Court of Appeals, as reported at 90 Or Adv Sh 1811, 471 P2d 830. Rehearing was denied August 4, 1970, and the Oregon Supreme Court denied review September 22, 1970. The ground petitioner seeks to raise herein was raised in said appeal and in the petition for review, and the petitioner cannot now raise it under the Oregon Post-Conviction Hearing Act. Therefore, petitioner has exhausted his remedies in the courts of the State of Oregon.

FOR ANSWER TO THE PETITION FOR A WRIT OF HABEAS CORPUS, RESPONDENT MOVES:

The Court for an order denying and dismissing the Petition for a Writ of Habeas Corpus for the reason that the petitioner was afforded a full and fair hearing on this issue in the state courts. The relevant constitutional principles were properly applied to undisputed facts, and all material facts were fully developed. Therefore, the criteria required by the United States Supreme Court

in *Townsend v. Sain*, 372 US 293 (1963), have been met. In support, respondent attaches copies of the relevant portion of the trial court transcript, and the opinion of the Court of Appeals of the State of Oregon as reported in 90 Or Adv Sh 1811, marked Exhibit "3" and Exhibit "4" respectively, and incorporated herein by this reference.

This motion is made pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure and 28 USCA § 2254 (a-c). Respondent will also rely upon the cases listed in petitioner's petition, most specifically on *United States v. Bilotti*, 380 F2d 649 (2d Cir), cert den 389 US 944 (1967).

LEE JOHNSON
Attorney General

/s/ Jim G. Russell
Assistant Attorney General
Attorneys for Respondent

[Exhibits "1", "2", "3" and "4" omitted in printing]

PRE-TRIAL STIPULATION

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

[By letter dated June 29, 1971, counsel for Naughten advised the clerk of the court that the parties stipulated that the trial transcript would be filed as an exhibit, that there would be no need for an evidentiary hearing, that oral argument was waived, and the case would be submitted on written briefs].

TRANSCRIPT OF NAUGHTEN'S STATE COURT TRIAL
(excerpt)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON,	)	
	)	
Plaintiff,	)	No. C-51788
	)	
vs.	)	
	)	
HUGH KYLE NAUGHTEN,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

[March 26, 1969]

* * * * *

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MR. HOWLETT: Your Honor, the defendant will rest his case as well.

THE COURT: Do I have your Requested Instructions?

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MR. HOWLETT: No, your Honor, it is the same instructions that this Court usually gives.

THE COURT: Very well. You may proceed with your argument.

MR. BRUUN: Thank you, your Honor.

(Thereupon, closing arguments were made to the Court and the jury by counsel for the respec-

tive parties, after which the following further proceedings occurred:)

THE COURT: Ladies and gentlemen of the jury, if, during the course of these instructions, I do not speak loud enough for you to hear, don't hesitate to raise your hand, and I will attempt, despite my present affliction, to speak louder.

It is now the duty of the Court to instruct you as to the law.

The just determination of every legal controversy depends upon finding the true facts and applying to those facts the correct legal principles. Under our system of jurisprudence, the Court decides all questions of law and procedure arising during a

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trial, and it is the jury's duty to follow the Court's instructions in these matters. If the Court should make a mistake in the law, means exist by which it can be corrected.

On the other hand, the jury is the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. Its findings as to the facts are final, and there is no procedure for correcting any mistakes it may make as to the facts. The jury's power, however, is not arbitrary; and if the Court instructs you as to the law on a particular subject or how to judge the evidence, you must follow such instructions. It is of the utmost importance, therefore, that in performing

your functions as jurors, you understand the instructions which I shall give to you.

In this case there has been an Indictment filed against the defendant in which the defendant is charged with the commission of the crime of Assault And Robbery Being Armed With A Dangerous Weapon, alleged to have been committed as follows:

"The said HUGH KYLE NAUGHTEN on or about the 17th day of August, A.D. 1968, in Multnomah County and State of Oregon, and being armed with a dangerous weapon, to-wit, a pistol, did commit an

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assault upon one James R. Livengood by threatening and menacing the said James R. Livengood with said dangerous weapon, and did unlawfully and feloniously take money of the United States of America from the person of the said James R. Livengood, and against his will, . . ."

You will have this Indictment with you in the jury room. The Indictment itself and the fact that an Indictment has been filed are not evidence. The Indictment is merely the formal statement of the charge.

To this Indictment the defendant has entered a plea of Not Guilty. The plea of Not Guilty is a denial of every material allegation contained in the Indictment.

The material allegations of the Indictment are as follows:

(1) That the defendant, Hugh Kyle Naughten, being armed with a dangerous weapon, to-wit, a pistol,

(2) Assaulted one James R. Livengood, and

(3) Took from the person of the said James R. Livengood, and against his will, money of the United States of America;

That the defendant at the time of the

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taking, if any, of the money had the intent to personally deprive the said James R. Livengood thereof, and

That the crime, if any, occurred on or about the 17th day of August, 1968, or within three years prior to the return date of the Indictment, which is October 25, 1968, and

That the crime, if any, took place or was triable in Multnomah County, Oregon.

The laws of the State of Oregon provide, and I quote from the statute:

"Any person being armed with a dangerous weapon who assaults another, and who robs, steals, or takes from the person assaulted any money or other property shall be punished as by law provided."

Robbery is the felonious taking of property, in this case money of the United States of America, from another by force. There must be actual taking and carrying away. Such actual taking and carrying away, being necessary to the robbery, is a part of the robbery, and while one engaged in the criminal enterprise is in the act of so carrying away, he is in the act of robbery.

There may be a completed robbery if there is any removal, however slight, of the money taken.

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The carrying away of the money which was the subject

of the robbery from the person of the party entitled to its possession is a necessary ingredient of the crime and is as much a part of the crime as the felonious taking or the violence.

In proving robbery of money, it is not necessary for the State to prove that any particular amount of money was taken. It is only necessary for the State to prove that in committing the robbery, some United States money was taken.

You may infer from the use of a pistol in the commission of the robbery that the pistol was loaded and was a dangerous weapon.

A "dangerous weapon" is a weapon by which death or serious bodily harm may be inflicted.

The amount of force to put the victim, James R. Livengood, in fear is not a necessary ingredient to the commission of the crime of robbery. Any force or display of force sufficient to accomplish the taking of the said money with the intent to deprive the said James R. Livengood permanently thereof is all that is required.

In reference to ownership of the money involved in this case, all the State has to prove is that the money allegedly carried away was in the

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possession of the said James R. Livengood.

The law provides for certain disputable presumptions which are to be considered as evidence.

A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence.

However, since these presumptions are disputable presumptions only, they may be out-weighed or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.

The law presumes that the defendant is innocent, and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.

Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt.

Reasonable doubt means an honest uncertainty as to the guilt of the defendant. A reasonable

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doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs.

Your verdict should be based only upon these instructions and upon the evidence in this case. It is your duty to weigh the evidence calmly and dispassionately and to decide the questions upon their merits. You are not to allow bias, sympathy, or prejudice any place in

your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture, or speculation. Furthermore, you must not consider what sentence might be imposed upon the defendant.

In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

A witness found to be intentionally false in a part of his or her testimony is to be distrusted in others. The term "witness" includes the parties.

You are not bound to find in conformity

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with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence.

Upon your return to the jury room, select some one of your number, man or woman, to act as foreman. Your foreman is to preside and to be spokesman. Then deliberate and find your verdict.

This being a criminal case, ten or more of your number must agree upon your verdict. When you have arrived at a verdict, the foreman will sign it upon the appropriate form.

You will have with you in the jury room, in addition to the Indictment and Exhibits in the case, two forms of

verdict, the first of which, omitting the title, reads as follows:

"We, the jury duly empaneled and sworn in the above-entitled court and cause, find the defendant, HUGH KYLE NAUGHTEN, GUILTY as charged in the indictment," and a line for your foreman to sign, which form of verdict you will use in the event your verdict is one of Guilty.

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The other form of verdict, omitting the title, reads as follows:

"We, the jury duly empaneled and sworn in the above-entitled court and cause, find the defendant, HUGH KYLE NAUGHTEN, NOT GUILTY," and a line for your foreman to sign, which form of verdict you will use in the event your verdict is one of Not Guilty.

Now, do the parties have any exceptions they care to take in Chambers out of the present of the jury?

MR. HOWLETT: Yes, your Honor.

(Thereupon, the Court, counsel, the defendant, and the reporter retired to Chambers, where the following occurred without the presence of the jury:)

MR. HOWLETT: First of all, I want to except to the instruction that every witness is presumed to speak the truth—I have been taking that exception—on the ground and for the reason that it denies the defendant the right to a presumption of innocence. They are doing that in the Federal Court, but the Oregon Supreme Court hasn't ruled on it yet.

THE COURT: You may have an exception.

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MR. HOWLETT: Now, then, there were several instructions, and I can't quote them because I can't write that fast, and they went along the line that regardless of the party—is there any way we could get your instructions so I could read it in the record? Could the Clerk get it?

(Thereupon, the instructions were furnished to counsel for the defendant.)

MR. HOWLETT: I take exception, your Honor, to the instruction which reads as follows: In deciding this case, you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

I take exception for the reason that the defendant presented no evidence nor testified, himself, and it is a comment on the fact that the defendant failed to take the witness stand, and would leave the jury with the belief that the defendant had some burden.

THE COURT: I will correct that; you may have an exception.

MR. HOWLETT: And then where it says: A witness found to be intentionally false in a part of his or

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her testimony is to be distrusted in others. The term "witness" includes the parties.

And I would have to take exception to that on the

ground that it would be a comment on the failure of the defendant to take the witness stand, or it would leave the jury with the feeling that the defendant had some duty to take the witness stand or to present some evidence.

THE COURT: You may have an exception; I will correct it.

MR. HOWLETT: Then, under number of witnesses: You are not bound to find in conformity with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence.

And I would have to take exception because it would leave the jury with the idea that there was some burden on the defendant either to take the witness stand or to produce some evidence; and since he did not do so, I would feel it was prejudicial.

THE COURT: You may have an exception.

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MR. HOWLETT: I didn't prepare an instruction about the defendant not having the burden of—that he need not take the witness stand, and no inference of guilt should be considered upon his failure to do so, but if the Court would do it, —

THE COURT: Well, I don't know, with your supercritical attitude, I might—if you want to make a request, I will be glad to consider it.

MR. HOWLETT: I will request it, your Honor.

THE COURT: Well, in writing.

HR. HOWLETT: All right, I can write it down.

(Pause.)

THE COURT: Do you have any exceptions?

MR. BRUUN: No, I have no exceptions, your Honor. I haven't seen the instruction, though.

(Thereupon, the instruction was handed to counsel for the State.)

MR. BRUUN: Your Honor, isn't there a standard instruction for this?

THE COURT: There is.

MR. BRUUN: I have no objection.

THE COURT: I don't know whether you are entitled to it or not, but I have never known of a defendant that didn't take the stand where he wasn't convicted, so I don't think it makes any difference.

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(Thereupon, the Court, counsel, the defendant, and the reporter returned to the courtroom, where the following occurred within the presence of the jury:)

THE COURT: Ladies and gentlemen of the jury, the Court in its instructions referred to burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter, and thing contained in the Indictment, and the presumption which belongs to the defendant and which

goes with the defendant to the jury room of being not guilty relieves the defendant of any obligation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so.

You may swear the baliff.

(Thereupon, the Bailiff was sworn.)

THE COURT: You will accompany the Bailiff, ladies and gentlemen.

OPINION OF U.S. DISTRICT COURT

[Opinion set forth verbatim as Appendix B, pages 16-18 of the printed petition for writ of certiorari].

JUDGMENT ORDER OF U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN,	)	
	)	
Petitioner,	)	
	)	Civil No. 71-80
v.	)	JUDGMENT
	)	ORDER
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
	)	
Respondent.	)	

Based upon the findings of fact and conclusions of law in the opinion of the Court entered this day, the petition for writ of habeas corpus is dismissed.

Dated this 4th day of November, 1971.

/s/ Gus J. Solomon
United States District Judge

OPINION OF U.S. COURT OF APPEALS

[Opinion set forth verbatim as Appendix C, pages 19-21 of the printed petition for writ of certiorari.]

JUDGMENT OF U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH NAUGHTEN, Appellant,	)	
v.	)	No. 71-3065
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Appellee.	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered May 24, 1972.

ORDER ON PETITION FOR REHEARING

[Order set forth verbatim as Appendix D, pages 22-23 of the printed petition for writ of certiorari.]

SEPARATE DISSENTING OPINION OF CHAMBERS, C. J.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH NAUGHTEN,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 71-3065
	)	
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
Respondent-Appellee.	)	

[February 26, 1973]

Appeal from the United States District Court
for the District of Oregon

CHAMBERS, Circuit Judge, dissenting:

Naughten was charged with robbing a Quickie Mart drive-in grocery store in Portland, Oregon, on August 17, 1968. The evidence at trial consisted of the testimony of James R. Livengood, the proprietor of the store, the testimony of Larree E. Weissenfluh, a friend of Livengood who was in the store with Livengood, and the testimony of the officers who arrested Naughten and investigated the crime.

Livengood testified as follows:

The store closed at midnight. Around midnight on August 17, 1968, Livengood was in the store preparing the till change for the next morning. Livengood's friend

Weissenfluh was in the store partly because Livengood did not like to be in the store alone late at night. The store was well-lighted, even after closing, since several of the banks of lights were left lighted all night. There were large glass doors at the front of the store.

At approximately 12:10 a man entered the store, brandished a pistol and said, "This is a holdup." The robber took three stacks of currency from the counter top where Livengood was working. There had been 21 $1. bills, 9 or 11 $5. bills, and 3 $10. bills. The robber told Livengood to open the safe. Livengood opened the safe, and the robber removed a small, brown paper grocery bag filled with quarters from the safe.

The bandit ordered Livengood and Weissenfluh to the rear of the store to a walk-in cooler. After they had been in the rear of the store a short time, Weissenfluh said, "He's gone." Livengood went to the front of the store, but the robber was still there. The robber ordered Livengood to get back to the rear of the store and stay there or the robber would use the pistol. The robber put the pistol to Livengood's head and directed him to the rear of the store, threatening to pistol-whip him if he did not obey.

After a moment, Weissenfluh said, "He's gone, I'm sure he's gone this time." Livengood went up front again, got his pistol from under the counter, and looked for the robber. The robber was gone. Livengood went out front and saw the robber in the parking lot of a tavern across the street for only a brief moment.

Livengood called the police and reported the robbery,

then stayed on the telephone watching the parking lot across the street. He saw a car leave, then another that appeared to be driven by the robber. A police car pulled up at that moment and stopped the car pulling out of the parking lot. Livengood went over to the car and identified the driver as the robber. He was not wearing the overcoat he had worn in the store, and Livengood did not see the pistol.

Livengood described the robber's pistol as being about six inches long, .22 calibre, and old and worn. Livengood said that the robber wore dark trousers, a light-colored shirt, and an overcoat. The robber was about two to three feet away from Livengood. The robber was in the store a total of fifteen minutes, and of that time Livengood observed him all but two or three minutes.

Livengood identified Naughten at trial as the robber. The prosecutor asked, "Is there any doubt in your mind?"

Livengood responded, "None whatsoever."

On cross-examination, Livengood denied that he had viewed any lineups or any photospreads containing pictures of Naughten. Livengood denied talking about the case with anyone except for answering some questions for the deputy district attorney the day before the trial. Livengood admitted being with Weissenfluh the evening before his testimony, but denied discussing the case except to wonder how long it would last. Livengood said that he had never before testified in a case.

Weissenfluh testified as follows:

He was a shipping clerk, not employed at the Quickie Mart. On the night of the robbery he had been visiting with Livengood at the store since about 10:00 p.m. They planned to have a few beers after closing. At about 12:10, Weissenfluh was standing in front of the glass doors when Livengood said, "Turn around." When Weissenfluh turned, he saw a man with a gun who said, "Don't move." The robber picked up the money from the counter, put it in his coat pocket, then ordered Livengood to open the safe. The robber reached into the safe and removed something Weissenfluh could not identify.

The robber then marched Weissenfluh and Livengood to the cooler that covered the back wall. Weissenfluh thought he could see the store from the cooler and said, "He's gone." They both ran up front to get Livengood's pistol. The robber was not gone. The robber marched them back to the cooler with pistol in Livengood's neck. He threatened to pistol-whip Livengood.

Weissenfluh and Livengood waited until the robber left, then went up front. Livengood grabbed his gun from under the counter, Weissenfluh took it from him while Livengood got on the phone and called the police. Weissenfluh fired two shots at the fleeing robber. The robber went to a tavern parking lot across the street and Weissenfluh lost sight of him.

Weissenfluh saw one car leave the lot across the street, then the car apparently driven by the robber. Livengood described the car with the robber in it to

the police over the telephone. Just as the robber's car was emerging from the lot, two police cars arrived and arrested the three occupants. Weissenfluh identified the driver as the robber. Although Weissenfluh could only see the head of the driver of the car, he had no difficulty in identifying him. As Weissenfluh said, "When someone sticks a gun in my ribs, I don't forget their face."

Weissenfluh testified that the robber wore slacks, shirt and tweedy sport coat or car coat. He identified the pistol as a long-barreled .22 calibre. When the prosecutor asked Weissenfluh if the robber were in the court, Weissenfluh identified Naughten.

"Q Is there any douiot in your mind?

"A No, there's not, no doubt whatsoever."

On cross-examination, some inconsistencies developed between Livengood's testimony and Weissenfluh's. Livengood had testified that he had seen Weissenfluh at the police station when he went to sign a complaint. Weissenfluh denied ever having been in the police station. Weissenfluh stated that he had spent the night before testifying in Livengood's hotel room. (Livengood had moved away from Portland.) Livengood had testified that they had only played pool the evening before. Livengood testified that he wanted Weissenfluh in the store for protection late in the evening. Weissenfluh said he was only there because he and Livengood were going to have a few beers later in the evening.

In addition to Weissenfluh and Livengood, two uniformed police officers and one detective testified. The

officers testified that they had received a radio call to go to the Quickie Mart since there was a robbery in progress. They received a description of the car that Livengood thought he had seen the robber driving. As the officers arrived, they saw a car matching the description pull out of the tavern parking lot across the street. They pulled over the car and arrested all three occupants. One of the men identified Naughten, the driver, as the robber. Naughten was placed in the rear of one of the police cars. One of the officers saw Naughten attempting to conceal money in the crack of the seat of the police car. Naughten had his hands cuffed behind his back, and he was pulling the money from his right rear pants pocket and stuffing it into the crack. The officers seized the money and found 21 one dollar bills, eleven five dollar bills, and three ten dollar bills.

Naughten was not wearing a coat, and a search of him and the car he was driving revealed no pistol. However, in searching the parking lot, the officers did find a bag of quarters near the rear door of the tavern.

A detective on the case was not able to add much except to identify the clothes taken from Naughten the night of the robbery, and to testify that he had ordered the store dusted for fingerprints.

Naughten offered no witnesses in his own defense.

From the foregoing we see precious little discrepancies in the testimony—only the slight variances that tend to confirm veracity of two witnesses to the same event.

Obviously, under *Chapman v. California*, 386 U.S. 18

(1967) and *Harrington v. California*, 395 U.S. 250 (1969), we can say beyond a reasonable doubt the alleged error was harmless.

In a case so harmful to delicate state-federal relations we ought to take the case en banc. Cf. *Leiter Minerals v. United States*, 352 U.S. 220 (1957).

It is clear the federal courts now on direct appeal, where objection was made timely in lower courts, usually reverse on the instruction. But I am unconvinced that the point rises to constitutional dimensions. The inept instruction obviously comes from Mathes and Devitt, Federal Jury Practice and Instructions § 72.01 (1965), and we must assume it has been given thousands of times.

This sort of thing should be left to the states when it is a state case.

Circuit Judge Goodwin concurs in the foregoing expressed dissent.

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

HOYT C. CUPP, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

No. 72-1148

[April 23, 1973]

The motion of respondent for leave to proceed in *forma pauperis* and the petition for a writ of certiorari are granted.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Hoyt C. Cupp, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 24, 1972, and amended, on petition for rehearing, on January 18, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon affirming Naughten's armed robbery conviction, Appendix A hereto, is reported at 3 Or. App. 241, 471 P.2d 830 (1970). The opinion of the United States Dis-

trict Court for the District of Oregon denying Naughten's petition for habeas corpus relief, Appendix B hereto, is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the district court and the order on petition for rehearing amending that opinion, Appendices C and D hereto, are not yet reported. The separate opinion which Chambers, C. J., expressed his intention to file in the order on petition for rehearing is not yet reported, and has not been received by counsel to date, but will be presented in a supplement to this petition as soon as possible.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, Appendix C hereto, was entered on May 24, 1972. A timely petition for rehearing en banc was denied on January 18, 1973 (see Appendix D hereto), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Does the Fourteenth Amendment prohibit an instruction to the jury in a state criminal trial, that all witnesses are presumed to speak the truth and describing the manner in which the presumption may be overcome, notwithstanding other specific instructions on the presumption of innocence and the burden of proof in criminal cases?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A state court jury convicted Hugh Naughten of the crime of assault and robbery while armed with a dangerous weapon. The conviction was affirmed by the Oregon Court of Appeals, *State v. Hugh Kyle Naughten*, 3 Or. App. 241, 471 P.2d 830 (1970). (Appendix A). Petition for review was denied by the Oregon Supreme Court on September 22, 1970.

Naughten commenced the present federal habeas corpus action in the United States District Court for the District of Oregon, pursuant to 28 USC §§ 2241, et seq. The district court, per Solomon, J., denied the petition (Appendix B). On appeal, the Ninth Circuit, in an opinion by Ely, J., joined by Jertberg and Hufstedler, JJ., reversed and remanded (Appendix C).

Thereafter, petitioner, Hoyt C. Cupp, filed in the Ninth Circuit a petition for rehearing and suggestion of appropriateness for rehearing en banc. By a vote of six judges in favor of granting rehearing and six judges opposed, the petition for rehearing was denied (Appendix D). The separate opinion of Chambers, C. J., who voted in favor of granting rehearing, had not been received as of the filing of this petition, and petitioner will supplement the petition when that opinion is filed. Naughten's present custodian, the petitioner herein, seeks review of the Ninth Circuit's decision.

Only one issue has been raised and preserved throughout these proceedings. That issue is whether the giving of a challenged instruction so placed the burden on Naughten to prove his innocence as to entitle him to relief in federal habeas corpus.

Naughten was tried before a state-court jury on the charge of assault and robbery while armed with a dangerous weapon. There was testimony at the trial that on August 17, 1968, a robbery occurred at a Quickie Mart in Portland, Oregon (Tr. 9-12). The owner, Mr. Livengood, identified Naughten as the robber. (Tr. 27). Mr. Weisinfluh, an eyewitness, also identified Naughten as the robber. (Tr. 61). Police officers Akers and Carpenter, who arrived on the scene shortly after the robbery, discovered Naughten near the scene. (Tr. 72-74, 88-89). Naughten did not testify and did not present any witnesses.

The trial court instructed the jury:

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption". (Tr 137).

The instruction was based on Oregon statutory law. ORS 44.370. Naughten excepted to the giving of the instruction (Tr. 1), and the instruction was assigned as error on appeal following conviction.

The trial court instructed the jury on the elements of the offense and other pertinent matters, including the following instructions on the burden of proof, presumption of innocence and the function of the jury in evaluating the evidence.

"* * * [T]he jury is the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. Its findings as to the facts are final, and there is no procedure for correcting any mistakes it may make as to the facts. The jury's power, however, is not arbitrary; and if the Court instructs you as to the law on a particular subject or how to judge the evidence, you must follow such instructions. It is of the utmost importance, therefore, that in performing your functions as jurors, you understand the instructions which I shall give to you." (Tr. 133)

"The law provides for certain disputable presumptions which are to be considered as evidence.

"A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence. However, since these presumptions are disputable presumptions only, they may be out-weighed

or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.

"The law presumes that the defendant is innocent, and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.

"Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt.

"Reasonable doubt means an honest uncertainty as to the guilt of the defendant." (Tr. 137).

"A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs.

"Your verdict should be based only upon these instructions and upon the evidence in this case. It is your duty to weigh the evidence calmly and dispassionately and to decide the questions upon their merits. You are not to allow, bias, sympathy, or prejudice any place in your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture, or speculation. Furthermore, you must not consider what sentence might be imposed upon the defendant.

"In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

"A witness found to be intentionally false in a part of his or her testimony is to be distrusted in others. The term "witness" includes the parties.

"You are not bound to find in conformity with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence." (Tr. 138-139).

At the conclusion of the prepared instructions, there was a conference out of the presence of the jury. The following colloquy occurred:

"MR. HOWLETT: I didn't prepare an instruction about the defendant not having the burden of—that he need not take the witness stand, and no inference of guilt should be considered upon his failure to do so, but if the Court would do it,—

"THE COURT: Well, I don't know, with your supercritical attitude, I might—if you want to make a request, I will be glad to consider it.

"MR. HOWLETT: I will request it, your Honor.

"THE COURT: Well, in writing.

"MR. HOWLETT: All right, I can write it down.

(Pause.)

"THE COURT: Do you have any exceptions?

"MR. BRUUN: No, I have no exceptions, your Honor. I haven't seen the instruction, though.

(Thereupon, the instruction was handed to counsel for the State.)

"MR. BRUUN: Your Honor, isn't there a standard instruction for this?

"THE COURT: There is.

"MR. BRUUN: I have no objection.

"THE COURT: I don't know whether you are entitled to it or not, but I have never known of a defendant that didn't take the stand where he wasn't convicted, so I don't think it makes any difference.

(Thereupon, the Court, counsel, the defendant, and the reporter returned to the courtroom, where the following occurred within the presence of the jury:)

"THE COURT: Ladies and gentlemen of the jury, the Court in its instructions referred to burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter and thing contained in the Indictment, and the presumption which belongs to the defendant and which goes with the defendant to the jury room of being not guilty relieves the defendant of any obligation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so." (Tr 143-144).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals, has, by a 6 - 6 decision not to grant rehearing, decided an important question of Fourteenth Amendment law in a way in conflict with the final decision of the courts of the State of Oregon on precisely the same question.

B. The Court of Appeals' decision has the effect of holding that any presumption in state criminal law which aids the prosecution conflicts with the presumption

of innocence if the defendant does not testify or present witnesses.

C. The Court of Appeals' decision holds in effect that a statute of the State of Oregon establishing a statutory presumption is unconstitutional as applied.

D. The Court of Appeals' decision is the first reported federal decision holding that an instruction on the presumption of truthfulness given in a state trial court violates federal constitutional principles. In view of the widespread use of the instruction, resolution of the question is important to avoid unnecessary friction in state-federal relations.

As noted above, the Oregon Court of Appeals held that the instruction that witnesses are presumed to speak the truth was not erroneous, relying upon a decision of the Supreme Court of Oregon in *State v. Kessler*, 254 Or. 124, 458 P.2d 432 (1969).

That decision found no error in giving the instruction if accompanied by an explanation of how the presumption can be overcome.

The Federal District Court recognized that similar instructions had been considered in other circuits, but that these cases did not involve appeals from state court convictions. The Federal District Court found that the instruction was proper under Oregon law and did not deprive the petitioner of a federally protected constitutional right, and that the evidence of guilt was so overwhelming that the instruction, even if erroneous, was

harmless under *Harrington v. California*, 395 U.S. 250 (1969).

The Ninth Circuit panel held that the effect of the challenged instruction was to place the burden on Naughten to prove his innocence, notwithstanding other instructions by the court. The panel further found that the constitutional error was not harmless beyond a reasonable doubt. The panel did not refer in its opinion to another decision of the Ninth Circuit, *Smith v. Cupp*, 457 F.2d 1098 (9th Cir. 1972) which had held that the issue was not of constitutional magnitude. On petition for rehearing, in the present case, the opinion of the panel was affirmed by a 6 - 6 vote not to grant rehearing.

The instruction in question has sometimes been criticized in federal prosecutions. See, *e.g.*, *United States v. Persico*, 349 F.2d 6, 19 (2d Cir. 1965); *United States v. Meisch*, 370 F.2d 768, 773 (3d Cir. 1966); *United States v. Bilotti*, 380 F.2d 649, 655 (2d Cir. 1967). In other cases, however, the giving of the instruction has been held not to be reversible error. *United States v. Gray*, 464 F.2d 632 (8th Cir. 1972). In no prior case which petitioner has discovered has a federal court held that the giving of the challenged instruction in a state criminal prosecution violates a federal constitutional right.

The purpose of an instruction such as the one involved herein is to prevent arbitrary and capricious results in the analysis of evidence. It is an additional caution to the jury of the grave task before them. The instruction is a far less restrictive and burdensome alternative from the defendant's point of view than the

court being permitted to comment on the evidence or guilt of the accused, as is allowed in the federal system. See *e.g., United States v. Spica*, 413 F.2d 129 (8th Cir. 1969). *Kyle v. United States*, 402 F.2d 443 (5th Cir. 1968); *Beck v. United States*, 140 F.2d 169 (D.C. Cir. 1943).

The claimed vice of the instruction is that it suggests to the jury that the defendant has the burden of overcoming the state's case. The instruction itself specifically refutes any such possible inference. In addition, the jury in this case was specifically instructed that the burden was upon the state to prove its case beyond a reasonable doubt, that the defendant was presumed to be innocent, and that he had no obligation to present a defense. The decision on the part of the defense to present evidence is a tactical one. If the defendant chooses not to call witnesses, that is his choice and he cannot raise his challenge to a constitutional level simply because he does not choose to call witnesses. See *Luna v. Beto*, 395 F.2d 35, 40 (5th Cir. 1968), cert. den. 394 U.S. 966 (1969) (concurring opinion). *Cf. California v. Green*, 399 U.S. 149 (1970).

The Ninth Circuit in its opinion stated that the instruction to the jury concerning the presumption that witnesses speak the truth violated due process guarantees, since it shifted the burden of proof to the defendant to prove his innocence. The opinion, in arriving at its conclusion without analysis, leads to the inescapable conclusion that presumptions *per se* are constitu-

tionally invalid, since all presumptions tend to have the same effects alluded to in the opinion. This is simply not the state of the law as has been held by this Court in the many cases challenging presumptions that aid the prosecution in establishing a substantive element of the crime. See *e.g., United States v. Gainey*, 380 U.S. 63 (1965); *Yee Hem v. United States*, 268 U.S. 178 (1925); *Tot v. United States*, 319 U.S. 463 (1943).

The decision of the Ninth Circuit cites many federal cases which have criticized the presumption-of-truthfulness instruction. Even if it is the federal view that the instruction is erroneous, and it is not certain that it is, this is the first case in which a federal court has imposed such a rule upon a state. Federal courts are not free to substitute their views of court procedures for those of the states, unless there is constitutional error and the constitutional mandate that is violated extends to the states through the 14th Amendment. See *e.g., Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (concurring opinion of Powell, J.) This is particularly true where, as here, the federal courts are dealing with matters of procedure regarding the conduct of criminal trial in state courts. Thus, the present case presents serious questions concerning the preservation of comity between state and federal relations. *Cf.* 28 U.S.C. § 2254.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General
Counsel for Petitioner

February 1973

APPENDIX A

OPINION OF OREGON COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,)
Respondent,)
v.)
HUGH KYLE NAUGHTEN,)
Appellant.)

[3 Or. App. 241, 471 P.2d 830]

[July 9, 1970]

Department 2.

Appeal from Circuit Court, Multnomah County.

Charles W. Redding, Judge.

J. Marvin Kuhn, Deputy Public Defender, Salem, argued the cause for appellant. With him on the brief was Gary D. Babcock, Public Defender, Salem.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and Jacob B. Tanzer, Solicitor General, Salem.

Before Schwab, Chief Judge, and Langtry and Fort, Judges.

Affirmed.

PER CURIAM.

Defendant was tried and convicted upon jury trial of the crime of assault and robbery being armed with a dangerous weapon. He did not take the witness stand.

His sole ground of appeal is that the trial court erred in instructing the jury:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

This instruction is not erroneous. *State v. Kessler*, 254 Or 124, 458 P2d 432 (1969); *State v. Blank*, 1 Or App 550, 464 P2d 836 (1970).

Affirmed.

APPENDIX B

OPINION OF UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN, Petitioner,	)	
vs.	)	Civil No. 71-80
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.	)	OPINION November 4, 1971

Ross R. Runkel,
College of Law, Willamette University,
Salem, Oregon 97301,
Attorney for Petitioner.

Lee Johnson,
Attorney General,
Jim G. Russell, Assistant Attorney General,
State Office Building,
Salem, Oregon 97310,
Attorneys for Respondent.

SOLOMON, Judge:

Petitioner, Hugh Kyle Naughten, seeks habeas corpus relief from a judgment of conviction and sentence for armed robbery. He alleges that the trial court's instruction deprived him of his federally protected right to an acquittal unless the jury found him guilty beyond a reasonable doubt.

Petitioner was tried for the armed robbery of a grocery store. The owner of the store identified the petitioner and testified that petitioner pointed a gun at him and robbed the store. One eye witness corroborated the storekeeper's testimony. The two officers who arrested petitioner near the store also testified. Two pieces of clothing, identified as belonging to petitioner, were introduced in evidence along with a bag of money which the police found in the parking lot near petitioner's car.

Petitioner did not testify. Neither did he call any witnesses.

Over petitioner's objections, the Court instructed the jury:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

Petitioner asserted that this instruction diluted the presumption of innocence and in effect amounted to a presumption of guilt, even though the Court also instructed the jury that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt and that no adverse inference was to be drawn from the defendant's failure to testify. The Court also instructed the jury on how the presumption may be overcome.

The jury found petitioner guilty. He appealed the judgment of conviction and sentence. The Oregon Court of Appeals affirmed on the authority of *State v. Kessler*,

254 Or. 124 (1969), 458 P.2d 432, in which the identical instruction was approved, *State v. Naughten*, [3 Or. App. 241, 471 P.2d 830 (1970)], and the Oregon Supreme Court denied review.

In this habeas corpus proceeding the petitioner makes the identical contention he made in the State Court with respect to the instruction above quoted. By agreement this case was tried before me on the pleadings and on the record without oral testimony. The sole ground for relief is whether the instruction deprived petitioner of his federally protected constitutional right.

Like the Oregon courts, I find that there is no merit in petitioner's contention. Similar instructions have been criticized in *United States v. Meisch*, 370 F.2d 768 (3rd Cir. 1966), *United States v. Persico*, 349 F.2d 6 (2d Cir 1965), and in other cases in the Second and Third Circuits, but these cases do not involve appeals from State Court convictions.

I find that the instruction was proper under Oregon law. In any event, the giving of the instruction did not deprive petitioner of a federally protected constitutional right.

Here, the evidence of guilt was so overwhelming that the instruction, even if erroneous, was harmless under *Harrington v. California*, 395 U.S. 250 (1969).

Petitioner is not entitled to any relief.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52 (a).

Dated this 4th day of November, 1971.

Gus J. Solomon
United States District Judge

APPENDIX C

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH NAUGHTEN,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	No. 71-3065
	)	
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
Respondent-Appellee.	)	

[May 24, 1972]

Appeal from the United States District Court for the District of Oregon

---

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

ELY, Circuit Judge:

Naughten is an Oregon state prisoner, convicted of the offense of armed robbery. His direct appeal in the Oregon state courts was unsuccessful. *State v. Naughten*, 90 Adv. Ore. 1811, 471 P.2d 830 (App. 1970). Eventually, Naughten filed a petition for habeas corpus in the court below, and he now appeals from the denial of that petition.

In the state court trial, the judge, over Naughten's objection, instructed the jury as follows:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

Such an instruction has been almost universally condemned. *See United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967), *cert. den.* 390 U.S. 1031; *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967); *United States vx. Johnson*, 371 F.2d 800 (3d Cir. 1967); *United States v. Persico*, 349 F.2d (2d Cir. 1965). *See also United States v. Safley*, 408 F.2d 603 (4th Cir. 1969); *Harrison v. United States*, 387 F.2d 614 (5th Cir 1968); *Stone v. United States*, 379 F.2d 146 (D.C. Cir. 1967). In *Stone v. United States, supra*, Judge, now Chief Justice, Burger, wrote:

> "[This] instruction has a tendency to impinge on the presumption of innocence. Lurking in such an instruction is the risk that the jury might conclude that they were required to accept the testimony of the prosecution's witnesses at face value, particularly when it is not contradicted by other witnesses."

379 F.2d at 147.

In the state court trial, Naughten did not testify, nor did he present any witnesses in his defense. Thus, the clear effect of the challenged instruction was to place the burden on Naughten to prove his innocence. This is

so repugnant to the American concept that it is offensive to any fair notion of due process of law.

The appellee contends that other of the court's instructions offset the vice of the instruction which we have quoted. We do not agree, for there was no instruction so specifically directed to that under attack as can be said to have effected a cure.

The appellee also contends that the instruction, even if fatally defective under the federal constitution, was, in the circumstances, harmless beyond all reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). We reject this argument also. Once Naughten established the infringement of a constitutionally protected right, the burden shifted to the appellee to establish that the error was harmless under the *Chapman* standard. From our examination of the transcript of the trial proceedings, we conclude that the appellee could not, in this case, meet that burden. *Cf. Anderson v. Nelson*, 390 U.S. 523, 20 L. Ed. 2d 81, 88 S. Ct. 1133 (1968).

Naughten is entitled to a new trial; therefore, upon remand, the District Court will hold the petition in abeyance for a reasonable period, not to exceed sixty days, so as to afford Oregon the opportunity to reprosecute Naughten should it choose to do so.

Reversed and Remanded.

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted in printing]

[January 18, 1973]

Order on Petition for Rehearing

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

The court amends its original opinion in the subject case as follows:

(1) The insertion of a footnote reference ⓓ after the word "objection," the last word of the first line of the second paragraph of the slip opinion of May 24, 1972.

(2) The addition of a footnote ⓓ reading as follows: "The fact that Naughten made a timely objection to the instruction deserves emphasis. Absent such an objection, he would be in no position to challenge it. This is because, in the circumstances of a particular case and because of other contents of the instruction, an accused's attorney might appropriately deem it strategically advantageous to the accused that the instruction be given."

The court's original opinion having been thus amended, the panel as originally constituted has voted to deny the petition for rehearing and to reject the suggestion for *en banc* rehearing.

The full court has been advised of the suggestion for

en banc rehearing and has been advised of the foregoing amendments to the court's original opinion.

A judge in active service having requested that a vote be taken on the appellee's suggestion for *en banc* rehearing, such a vote has been taken. Rule 35(b) Fed. R. App. P. Judges Chambers, Koelsch, Wright, Trask, Goodwin, and Wallace would have granted *en banc* rehearing, and Judge Chambers wishes it recorded that he presently intends to write and file, at a later date, a separate opinion explaining his views.

The other six judges in active service voted to reject the suggestion for *en banc* rehearing. The vote being equally divided, the suggestion for *en banc* rehearing is rejected.

Gilbert H. Jertberg

Walter Ely

Shirley M. Hufstedler
United States Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon Court of Appeals affirming respondent Naughten's conviction of armed robbery is reported at 3 Or. App. 241, 471 P.2d 830 (1970), and is set forth as Appendix A, pp. 14-15 of petitioner's printed petition for writ of certiorari. The opinion of the United States District Court for the District of Oregon denying Naughten's petition for a writ of habeas corpus is not reported, and is set forth as Appendix B, pp. 16-18, of petitioner's printed petition for writ of certiorari. The opinion of the United States Court of

Appeals for the Ninth Circuit reversing the judgment of the district court is not yet reported and is set forth as Appendix C, pp. 19-23 of petitioner's printed petition for writ of certiorari. The order of the circuit court denying the petition for rehearing is not reported, and is set forth as Appendix D, pp. 22-23 of petitioner's printed petition for writ of certiorari. The dissenting opinion of Circuit Judge Chambers is not yet reported, and is set forth in the printed Appendix, pp. 28-34.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (A. 26) was entered on May 30, 1972. A timely petition for rehearing en banc was denied on January 18, 1973 (Appendix D, petitioner's printed petition for writ of certiorari). The petition for a writ of certiorari was filed on February 20, 1973, and was granted on April 23, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

[1] Throughout this brief, "A." refers to the printed Appendix; "Tr." refers to the one volume transcript of Naughten's state-court trial, the only exhibit in the present federal habeas corpus proceedings.

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Does the Fourteenth Amendment prohibit an instruction to the jury in a state criminal trial, that all witnesses are presumed to speak the truth and describing the manner in which the presumption may be overcome, notwithstanding other specific instructions on the presumption of innocence and the burden of proof in criminal cases?

STATEMENT OF THE CASE

A state court jury convicted Hugh Naughten of the crime of assault and robbery while armed with a dangerous weapon. The conviction was affirmed by the Oregon Court of Appeals, *State v. Hugh Kyle Naughten*, 3 Or. App. 241, 471 P.2d 830 (1970). Petition for review was denied by the Oregon Supreme Court on September 22, 1970.

Naughten commenced the present federal habeas corpus action in the United States District Court for the District of Oregon, pursuant to 28 USC §§ 2241, et seq. The district court, per Solomon, J., denied the petition. On appeal, the Ninth Circuit, in an opinion by Ely, J., joined by Jertberg and Hufstedler, JJ., reversed and remanded.

Thereafter, petitioner, Hoyt C. Cupp, filed in the Ninth Circuit a petition for rehearing and suggestion of appropriateness for rehearing en banc. By a vote of six judges in favor of granting rehearing and six judges opposed, the petition for rehearing was denied. Chambers, C. J., wrote a separate opinion dissenting from the denial of rehearing, in which opinion he was joined by Goodwin, J. Naughten's present custodian, the petitioner herein, seeks review of the Ninth Circuit's decision.

Only one issue has been raised and preserved throughout these proceedings. That issue is whether the giving of a challenged instruction so placed the burden on Naughten to prove his innocence as to entitle him to relief in federal habeas corpus.

Naughten was tried before a state-court jury on the charge of assault and robbery while armed with a dangerous weapon. There was testimony at the trial that on August 17, 1968, a robbery occurred at a Quickie Mart in Portland, Oregon (Tr. 9-12). The owner, Mr. Livengood, identified Naughten as the robber. (Tr. 27). Mr. Weisinfluh, an eyewitness, also identified Naughten as the robber. (Tr. 61). Police officers Akers and Carpenter, who arrived on the scene shortly after the robbery, discovered Naughten near the scene. (Tr. 72-74, 88-89). Naughten did not testify and did not present any witnesses.

The trial court instructed the jury:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his

or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption". (A. 16; Tr. 137).

The instruction was based on Oregon statutory law. ORS 44.370. Naughten excepted to the giving of the instruction (A. 18; Tr. 140), and the instruction was assigned as error on appeal following conviction.

The trial court instructed the jury on the elements of the offense and other pertinent matters, including the following instructions on the burden of proof, presumption of innocence and the function of the jury in evaluating the evidence.

"* * * [T]he jury is the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. Its findings as to the facts are final, and there is no procedure for correcting any mistakes it may make as to the facts. The jury's power, however, is not arbitrary; and if the Court instructs you as to the law on a particular subject or how to judge the evidence, you must follow such instructions. It is of the utmost importance, therefore, that in performing your functions as jurors, you understand the instructions which I shall give to you." (A. 12-13; Tr. 133).

* * *

"The law provides for certain disputable presumptions which are to be considered as evidence.

"A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence. However, since these presumptions are disputable presumptions only, they may be out-weighed or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.

"The law presumes that the defendant is innocent,

and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.

"Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt.

"Reasonable doubt means an honest uncertainty as to the guilt of the defendant. A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs.

"Your verdict should be based only upon these instructions and upon the evidence in this case. It is your duty to weigh the evidence calmly and dispassionately and to decide the questions upon their merits. You are not to allow, bias, sympathy, or prejudice any place in your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture, or speculation. Furthermore, you must not consider what sentence might be imposed upon the defendant.

"In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

"A witness found to be intentionally false in a part of his or her testimony is to be distrusted in others. The term "witness" includes the parties.

"You are not bound to find in conformity with

the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence." (A. 15-17; Tr. 137-139).

At the conclusion of the prepared instructions, there was a conference out of the presence of the jury. The following colloquy occurred:

"MR. HOWLETT: I didn't prepare an instruction about the defendant not having the burden of—that he need not take the witness stand, and no inference of guilt should be considered upon his failure to do so, but if the Court would do it,—

"THE COURT: Well, I don't know, with your supercritical attitude, I might—if you want to make a request, I will be glad to consider it.

"MR. HOWLETT: I will request it, your Honor.

"THE COURT: Well, in writing.

"MR. HOWLETT: All right, I can write it down.

(Pause.)

"THE COURT: Do you have any exceptions?

"MR. BRUUN: No, I have no exceptions, your Honor. I haven't seen the instruction, though.

(Thereupon, the instruction was handed to counsel for the State.)

"MR. BRUUN: Your Honor, isn't there a standard instruction for this?

"THE COURT: There is.

"MR. BRUUN: I have no objection.

"THE COURT: I don't know whether you are entitled to it or not, but I have never known of a defendant that didn't take the stand where he wasn't convicted, so I don't think it makes any difference.

(Thereupon, the Court, counsel, the defendant,

and the reporter returned to the courtroom, where the following occurred within the presence of the jury:)

"THE COURT: Ladies and gentlemen of the jury, the Court in its instructions referred to burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter and thing contained in the Indictment, and the presumption which belongs to the defendant and which goes with the defendant to the jury room of being not guilty relieves the defendant of any obligation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so." (A. 20-22; Tr. 143-144).

SUMMARY OF ARGUMENT

Instructions regarding the presumed truthfulness of witnesses, and the manner in which the presumption may be overcome, have been frequently employed in state criminal prosecutions. Such instructions do not require that the defendant in a criminal case present contradictory evidence, and the jury is free to reject the testimony of prosecution witnesses if it finds the testimony unworthy of belief. The instructions do not shift the burden of proof to the defendant, nor do they impinge upon the presumption of innocence, either intrinsically or by virtue of being expressed in terms of a presumption which aids the prosecution. No federally protected constitutional right was violated by the instruction, because the jury was given explicit instructions on the burden of proof and the presumption of

innocence. Moreover, the error in giving the instruction, if error it was, was harmless beyond a reasonable doubt in this case, because of the overwhelming evidence of guilt.

ARGUMENT

A. The instruction that witnesses are presumed to speak the truth, together with instructions describing the manner in which the presumption may be overcome, was proper under state law, and is a rational description of the process of evaluating the testimony of a witness.

As indicated in the Statement of the Case above, the challenged instruction given in Naughten's state court trial was:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."

The instruction was based, almost verbatim, on Oregon statutory law. Or. Rev. Stat. 44.370. That statute came into Oregon law in 1862 as the product of a code commission headed by Judge Matthew Deady. Deady's General Laws of Oregon 1845-1864, § 673. No record exists indicating the source from which the section was taken. Although the statute does not require that the jury in a criminal case be so instructed, the Oregon Supreme Court has held that an instruction in the language of the statute was proper in a criminal case in which the defendant presented no evidence. *State v. Kessler*, 254

Or. 124, 458 P.2d 432 (1969). Defendant's conviction was affirmed by the Oregon Court of Appeals. *State v. Naughten,* 3 Or. App. 241, 471 P.2d 830 (1970).

From 1872 until the enactment of a new evidence code in 1965, California Civil Procedure Code § 1847 (West, 1954) provided:

> "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

Instructions to this effect were the subject of reported decisions in *People v. Amaya,* 134 Cal. 531, 66 P. 794 (1901) and *People v. Sheffield,* 9 Cal. App. 130, 98 P. 67 (1908).

Similar instructions were upheld in Iowa: *State v. Wehde,* 236 Iowa 47, 283 N.W. 104 (1938) and *State v. Voelpel,* 208 Iowa 1049, 226 N.W. 770 (1929), and the presumption of truthfulness was asserted in *State v. Ormiston,* 66 Iowa 143, 23 N.W. 370 (1885).

In *State v. George,* 113 S.C. 154, 102 S.E. 284 (1920), that jurisdiction not only recognized a presumption of truthfulness, but held that it was error to instruct the jury that there was no presumption that a witness tells the truth.

One of the earliest federal cases to refer to a presumption of truthfulness was *Camp v. United States,* 297 F. 452, 454 (8th Cir. 1924). A similar expression was contained in *Wom Kam Chong v. United States,* 111

F.2d 707, 711 (9th Cir. 1940). In *Wichman v. Allis Chalmers Mfg. Co.*, 117 F. Supp. 857, 860 (W.D. Mo., 1954), the court noted:

> ". . . [i]t is the rule that a witness is presumed to speak the truth. 70 C. J., Section 915, p. 760. And it is the duty of the trier of a fact to harmonize evidence by assuming on disputed matters that each witness was attempting to tell the truth and that he was mistaken on any factual question rather than committing perjury."

In each of these federal cases, the presumption that witnesses were truthful was invoked by a trial or appellate court in weighing evidence which was in whole or in part unimpeached, and no jury instruction was involved.

A charge to the jury including such an instruction was set forth in *United States v. Dried Fruit Assoc. of California*, 4 F.R.D. 1 (N.D. Cal. 1944), but no challenge to the instruction was indicated.

The presumption of truthfulness emerged fully in the federal courts in 1961 in Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 67-68 (1961), containing Instruction No. 3.01:

> "You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive

and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

"Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves."

Subsequent federal decisions appear to ascribe the instruction directly to Judge Mathes's now superseded model. Since Judge Mathes was a federal trial judge in California, it seems likely that he derived the instruction from familiarity with practice in that state. In *Marsh v. United States*, 402 F.2d 457 (9th Cir. 1968), it was noted that the use of the instruction was common in the Ninth Circuit, which includes California and Oregon.

A number of federal circuit courts have criticized the use of similar instructions in federal trials. One of the first of these decisions was *Knapp v. United States*, 316 F.2d 794, 795 (5th Cir. 1963), wherein the court referred to the Mathes instruction as "platitudinous

generalities". Noting that no objection had been made on trial, the court said:

> "It is to say, though, that the use of these glittering generalities in this case was not error at all, much less plain error."

The Ninth Circuit, in the opinion below, noted recent decisions which have continued to disapprove of the use of the instruction in federal trials. See, *e.g.*, *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967); *Stone v. United States*, 379 F.2d 146 (D.C. Cir 1967); *United States v. Meisch*, 370 F.2d 768 (3d Cir 1966); and *United States v. Persico*, 349 F.2d 6 (2d Cir. 1965). Only in *Johnson* does it appear that the giving of the presumption instruction, in and of itself, warranted reversal.

Beginning an evaluation of a witness's testimony with a "presumption" that he will testify truthfully is a reflection of the manner in which historical facts are proved in a courtroom. Witnesses are summoned and sworn on oath to tell the truth. Traditionally, testimony under oath, like documents which are acknowledged or are under seal, has been accorded a verity not given to less formal statements. The witness is permitted by the rules of evidence to relate only those facts within his personal knowledge, and his testimony is subject to forensic testing by cross-examination, exclusion of other witnesses, the requirement of confrontation and the like. Finders of fact are persons chosen for their lack of prior knowledge of the facts and absence of predisposition regarding the case. The responsibility for determining the credibility of witnesses is assigned to citizen jurors who

are called upon to hear the evdence, heed the court's instructions on the law, and exercise objective judgment and good sense in finding the truth. The instruction that a witness is presumed to speak the truth, but that the presumption may be overcome, simply reminds the jurors of their responsibility to decide the case based on the evidence. Testimony should be heard with a willingness to believe the testimony if it is determined to be worthy of belief. In short, the jury is to be objective and critical, but not nihilistic.

Petitioner does not contend that the disputable presumption of witness truthfulness is the only reasonable method of evaluating witness credibility. See, *e.g.*, *Stix v. Keith*, 85 Ala. 465, 5 So. 184 (1888), which rejected the presumption of truthfulness on analytical grounds. Nevertheless, there is a substantial body of law, including that of Oregon, which accords the name, if not the substance, of a presumption to the notion that the jury is to hear the evidence with an open mind, and a willingness to accept testimony which it finds worthy of belief.

This Court made it clear in *In re Winship*, 397 U.S. 358 (1970) that the requirement that the prosecution in criminal cases prove guilt beyond a reasonable doubt is mandated by the Fifth Amendment, and is applicable to the states through the Fourteenth Amendment. Thus far, the Court has not directed that in addition, the jury in state criminal prosecutions be instructed at the conclusion of the evidence that the defendant is presumed to be innocent. As will be seen, instructions on pre-

sumptions favorable to the prosecution frequently, if not always, have the effect of running counter to a presumption of innocence instruction.

The instruction in the present case did not conflict with the requirement of proof beyond a reasonable doubt. An explicit instruction on the presumption of innocence was given. The issue is whether the presumption of truthfulness instruction impermissibly conflicted with the instruction on the presumption of innocence.

Abiding the Court's decision on whether an instruction on the presumption of innocence is required, petitioner contends that the presumption of truthfulness instruction does not significantly diminish the presumption of innocence. To the extent there is an arguable infringement, the presumption of truthfulness instruction is so innocuous in its reflection on the presumption of innocence as not to amount to a substantial conflict with federal due process standards.

The presumption of witness truthfulness, by its very terms, does not require defendant to produce either impeaching or contradictory evidence. A witness called by the prosecution may be disbelieved, based solely upon the manner in which the witness testifies, or the nature of his or her testimony.

In granting Naughten federal habeas corpus relief, the Ninth Circuit reasoned that since Naughten did not testify or present any witnesses in his defense, the effect of the challenged instruction was to place on Naughten the burden of proving his innocence.

If the presumption of truthfulness is a rational method of evaluating testimony by a trial or appellate court in a civil case in determining whether one party or the other is entitled to judgment as a matter of law based on uncontradicted testimony, or in a criminal case in which defendant presents testimony, it would seem that the fact that defendant in a criminal case does not present testimony would not alter the validity of the presumption as an analytical tool.

Witnesses to an event are chosen by the event itself and not by the prosecution. It makes no sense to say that the method of analyzing witness testimony, by presumption of truthfulness or otherwise, must vary depending on whether defendant presents witnesses who testify in conflict with those called by the state. The prosecution's burden of proof beyond a reasonable doubt remains constant, whether or not defendant testifies or calls witnesses. If he testifies or presents witnesses, the presumption of truthfulness applies to all witnesses.

It may well be that the presumption of truthfulness is not a true presumption at all, because by its terms it does not require the production of contrary evidence. If the initial assumption of truthfulness is not sufficiently strong to warrant properly being denominated as a presumption, it is difficult to see how it can be regarded as sufficiently potent to impinge upon the presumption of innocence, thrust upon defendant the burden of proof and diminish the requirement of proof beyond a reasonable doubt.

It is proper for federal circuit courts to determine that the use of certain instructions given by district courts in criminal trials should be discontinued, for any of a variety of reasons. The propriety of an instruction in state courts is a matter of state law, unless a significant impairment of federally protected constitutional rights is involved. No such significant impairment is presented here.

B. The instruction that witnesses are presumed to speak the truth, in the context of other instructions, did not shift to defendant the burden of proof or impinge on the presumption of innocence.

The Ninth Circuit held that since Naughten did not testify or present any witnesses in his defense, the effect of the challenged instruction was to place the burden on him to prove his innocence, and there was no other instruction so specifically directed to that under attack as could be said to effect a cure.

It is true that, taken in the abstract, an instruction that the only witnesses in the case were presumed to be truthful, presents a colorable issue of impingement on the presumption of innocence. However, the instruction must be viewed in context to be viewed fairly. In the present case, there was no reasonable possibility that the jury could conclude that they were required to accept the testimony of the prosecution witnesses at face value, or that the burden of proof had shifted to the defendant.

The instruction on the presumption of truthfulness

included the instruction that the presumption might be overcome not only by impeaching or contradictory evidence, but also:

> ". . . by the manner in which the witness testifies, by the nature of his or her testimony, . . . or by a presumption." (A. 16; Tr. 137)

The only other presumption on which the jury was instructed was the presumption of innocence. (A. 16; Tr. 137).

The jury was instructed that they were the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. (A. 12; Tr. 133).

They were charged that the burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt. The instructions on reasonable doubt included the following:

> "Reasonable doubt means an honest uncertainty as to the guilt of the defendant. A reasonable doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs." (A. 16; Tr. 137-138).

They were also instructed:

> "In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question." (A. 17; Tr. 138)

The reference to "which party has the burden of proof" was later corrected.

The jury was also told:

"You are not bound to find in conformity with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does not produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence." (A. 17; Tr. 138-139).

Following the giving of the prepared instructions, the court, the attorneys, Naughten and the court reporter left the jury in the courtroom and conferred in chambers regarding exceptions to the instructions. Counsel for Naughten excepted to a number of instructions. All of the exceptions were based on an expressed concern that the jury might have the feeling that Naughten had some duty to take the witness stand or present evidence. Counsel also asked for an instruction that guilt was not to be inferred from defendant's failure to testify, or present evidence. (A. 18-21; Tr. 140-143). Thereafter, the court, the attorneys, Naughten and the reporter returned to the courtroom, and the court gave the following further instruction:

"Ladies and gentlemen of the jury, the Court in its instructions referred to the burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter, and thing contained in the Indictment, and the presumption which belongs to the defendant and which goes with the defendant to the jury room of being not guilty relieves the defendant of any obli-

> gation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so." (A. 21-22; Tr. 144)

The jury having been again reminded by a special instruction separate from all others that Naughten was presumed to be innocent and that he had no burden of proof, it is inconceivable that they could have gone to the jury room thinking the contrary. Surely they did not partake of the emphasis which has been laid upon the presumption of truthfulness instruction by federal circuit courts. It is unlikely that they were able to remember it, even as a "platitudinous generality." In the context of instructions which were otherwise fair and sufficient, fair-minded laymen could not possibly have regarded the presumption of truthfulness instruction as shifting the burden of proof to defendant.

The Ninth Circuit did not regard the trial court's last instruction as curing the presumption of truthfulness instruction. The trial court was not required to retract the presumption instruction. The claimed vice of the presumption instruction is that it suggested that the burden of proof had shifted to defendant. The final instruction made it very clear that defendant was presumed to be innocent, and that he had no burden of proof.

C. The instruction that witnesses are presumed to speak the truth, and describing the manner in which the presumption may be overcome, does not violate

federal due process standards merely because the principle is couched in terms of a presumption.

It is generally recognized, and the state trial court's instructions advised the jury, that a presumption is a deduction which the law directs to be made from particular facts, and that disputable presumptions may be out-weighed or equaled by other evidence, but unless outweighed or equaled, they are to be accepted as true. (A. 15-16; Tr. 137-138). The presumption of witness truthfulness, by its very terms, does not require disputation by other evidence. The presumption of truthfulness "may be overcome by the manner in which the witness testifies [or] by the nature of his or her testimony", as well as by impeaching or contradictory testimony, or by a presumption." (A. 16; Tr. 137).

Expressed in terms of a presumption, the assumption that a witness will testify truthfully is weak enough considering that it may be overcome by the witness himself or the testimony itself, without more. Absent the title of a presumption, the force of the assumption is negligible indeed.

Does the fact that the assumption of truthfulness principle is designated as a presumption, result in impermissibly shifting to the defendant the burden of proving his innocence? Petitioner contends that it does not, because: (1) "the "presumption" in question intrinsically denies that it has that effect, and (2) because the use and explanation of presumptions, even if favorable to the prosecution, are not regarded as so inherently

subject to misapplication by juries as to conflict with the more pervasive presumption of innocence.

It is unnecessary to catalogue all of the presumptions which may be invoked to aid the government's case, and on which trial juries will be required to be instructed, along with instructions on the burden of proof and the presumption of innocence. Suffice it to consider the number of trials every judicial day wherein juries are instructed on the statutory presumptions which attend proof of various levels of blood-alcohol content in cases involving driving under the influence of intoxicating liquor.

In *Leary v. United States*, 395 U.S. 6 (1969), this Court upheld the statutory presumption that marihuana had been imported into the United States illegally, while striking down the presumption that the possessor knew of the illegal importation. See also *United States v. Romano*, 382 U.S. 136 (1965) (presumption that person present at still had possession of still, stricken); *United States v. Gainey*, 380 U.S. 63 (1965) (presumption that person present at still was a distiller, upheld); *United States v. Tot*, 319 U.S. 463 (1943) (presumption that firearm was subject of illegal interstate shipment if possessed by ex-convict, stricken). In those cases, the test of the validity of the presumption was held to be the rationality of the connection between the fact proved and the fact presumed. *United States v. Leary*, 395 U.S. at 36.

Thus, the fact that a presumption aids the prosecution does not *per se* impinge upon the presumption of

innocence or violate due process standards by shifting the burden to defendant to prove his innocence. It is true that the presumptions in *Leary*, *Romano*, *Gainey*, and *Tot* applied only to one element of the offense. That element was nevertheless central to criminality in each case, and the theoretical risk that a jury may confuse the presumption favoring the government with that favoring the defendant is no greater in the present case than with any other presumption the validity of which has been upheld.

The presumption here considered does not result in the jury being advised that because a witness has testified, his testimony is presumed true and must be accepted unless contradicted by defendant. The instruction as to the effect of a presumption does not give to the presumption a mandatory character beyond the scope of the presumption itself; otherwise, all presumptions suffer from the same vice. It cannot be assumed that the jury gave to the instructions a meaning which contradicts the instruction itself.

D. The instruction complained of was harmless in any event, in view of overwhelming evidence of guilt.

In his dissent from the denial of the petition for rehearing in the Ninth Circuit, (A. 28-34) Circuit Judge Chambers correctly pointed out that the trial testimony consisted of the testimony of the victim of the robbery, and a friend of the victim who was present in the store during the robbery, two officers who apprehended Naughten and a detective. The two eyewitnesses had

ample opportunity to observe Naughten, who was the sole robber. They positively identified him. As Judge Chambers noted there was:

> ". . . precious little discrepancy in the testimony—only the slight variances that tend to confirm veracity of two witnesses to the same event." (A. 33)

Judge Chambers believed that under *Chapman v. California*, 386 U.S. 18 (1967), and *Harrington v. California*, 395 U.S. 250 (1969), the alleged error was harmless beyond a reasonable doubt. The district court found that "the evidence of guilt was so overwhelming" that the error was harmless under *Harrington*. The Ninth Circuit concluded that the petitioner could not, in this case, meet the burden of establishing harmless error. In reaching that result without analysis, the Ninth Circuit panel apparently adopted the view that any constitutional "error" was prejudicial *per se*, which was the minority view in *Chapman*. Petitioner contends that under the *Chapman - Harrington* analysis, the error was harmless beyond a reasonable doubt. There was simply no reasonable possibility that the jury could have misconstrued an innocuous instruction to shift the burden of proof to the defendant. In any event, the evidence of guilt was overwhelming. There was simply no reasonable construction of the testimony from which innocence, or significant witness error, could be inferred.

CONCLUSION

For the above reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the judgment of the United States District Court for the District of Oregon affirmed.

Respectfully submitted,

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June 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

HUGH KYLE NAUGHTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

Respondent accepts petitioner's statement of opinions below.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction, correcting the date of the Circuit Court judgment to read May 24, 1972.

QUESTION PRESENTED

In a State criminal trial in which all the witnesses testified on behalf of the State, does a jury instruction that all witnesses are presumed to tell the truth (timely objected to) shift the State's burden of proving guilt beyond a reasonable doubt, place undue pressure upon the accused to testify, and deny the accused a trial by jury, as prohibited by the fifth, sixth, and fourteenth amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case, but also draws the Court's attention to that portion of the conference out of the presence of the jury which appears at A. 18-20; Tr. 140-142.

SUMMARY OF ARGUMENT

An instruction which expressly directs the jury to find that all witnesses speak the truth has as its purpose and effect the allocation of the burden of proof. To that extent it is similar to a presumption, rather than an inference. When all witnesses testify on behalf of the State, the instruction places the burden wholely upon the defendant. Unless the defendant carries the dual burden of going forward and of persuasion, the jury is obligated by law to find for the State.

The "presumption that witnesses speak the truth" is an historically sound device for appellate courts to test the sufficiency of evidence and to determine whether an issue should go to the jury. But when the jury is told they must apply the "presumption," the effect is to require conviction whenever the evidence is merely sufficient. This is equivalent to a directed verdict for the State.

Treated as a true presumption, the truthfulness presumption lacks a close connection between the proved fact and the presumed fact. Both law and social science recognize that in a very high percentage of cases witnesses should not be believed.

ARGUMENT

I.

A DIRECTION THAT STATE'S WITNESSES MUST BE BELIEVED REDUCES THE STATE'S BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT.

The State must prove guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970). The trial judge's duty under *Winship* is not discharged merely by giving a reasonable doubt instruction. The most obvious way of shifting the State's burden of proof is to give the jury an instruction regarding witness credibility which artificially prevents the jury from independently assessing the credibility of witnesses. *Cool v. United States*, 409 U.S. 100 (1972).

The truthfulness instruction directly contradicted the burden of proof instruction. In a series of related paragraphs the trial court instructed the jury on (1) the meaning of a presumption and its status as evidence, (2) the presumption of innocence, (3) the presumption of truthfulness, and (4) the reasonable doubt burden of proof. A. 15-16; Tr. 137-138. This series emphasized that the jury was expressly directed—not merely permitted—to find that the witnesses were truthful. The instructions also placed the truthfulness presumption on the same plane as the presumption of innocence. Although the jury was told (as in *Cool*) that the burden of proof was upon the State, they were also told that the law "expressly directs" them to believe the State's witnesses.

The instruction specified three ways in which the presumption could be overcome: (1) the manner or nature of the testimony, (2) *evidence* affecting character, interest, motives, or *evidence* contradicting the testimony, or (3) a presumption. *First*, the vague "manner"

or "nature" of the testimony does not require the defendant to go forward with the evidence, but it does place the burden of persuasion upon him. Also, overcoming the presumption by "manner" or "nature" of testimony is difficult because the presumption is evidence, and the jury was repeatedly told to consider only the evidence. *Second,* production of evidence to impeach or contradict places upon the defendant the dual burdens of going forward and persuasion. Whether the evidence would be provided by Naughten or by his witness, the burden was on him. After all, this is the whole reason for having presumptions. McCormick, Evidence §343 (2d ed. 1972). *Third,* overcoming the presumption "by a presumption" creates a direct collision between the presumption of truthfulness and the only other presumption in the case—innocence. The jury may not know which presumption is stronger, but an attentive juror would notice that the presumption of truthfulness is given greater strength than the presumption of innocence. This is because the truthfulness presumption requires the jury to convict unless it is *overcome* by the presumption of innocence.

No matter how many ways the presumption could be overcome, it still places the burden on Naughten, and the jury had to have more than a reasonable doubt as to the credibility of the State's witnesses in order to acquit.

It should be noted that the truthfulness instruction was not merely a comment on the evidence. The trial judge was not expressing his opinion on the evidence; he instructed the jury that a presumption has the force of law, which the jury was obliged to obey.

II.

THE BURDEN OF PROOF AS TO WITNESS CREDIBILITY CANNOT BE PLACED UPON THE DEFENDANT.

Cool v. United States, 409 U.S. 100 (1972), prevents the State from placing upon the defendant the burden of persuading the jury that his witnesses are credible. Likewise, the State may not place upon the defendant the burden of persuading the jury that the State's witnesses are not credible. When the defendant pleads not guilty, he places in issue all facts which go to proving his guilt. The State has both the burden of going forward with evidence and the burden of persuading the jury.

Some burdens can be placed upon a defendant. If the State has carried its burden of going forward and of persuasion, then the burden of proving excuse or justification can be placed upon the defendant. *Leland v. Oregon*, 343 U.S. 790 (1952) (insanity defense). However, the burden of disproving the elements of the crime cannot be placed upon the defendant. *E.g., Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968) (alibi); *Johnson v. Bennett*, 393 U.S. 253 (1968). This approach is supported by the commentators. Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L.J. 919; Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969).

After a conviction is had, a reviewing court properly may assume that the State's witnesses told the truth. This is merely an appellate court's device for testing the sufficiency of the evidence. But instructing the jury that witnesses are presumed to speak the truth is the same as instructing them that they must convict if the evidence is sufficient. Such a blending of the sufficiency of evidence test with the reasonable doubt test would make the reasonable doubt test quite meaningless.

III.

TREATED AS A PRESUMPTION, THE TRUTHFULNESS INSTRUCTION LACKS A CLOSE CONNECTION BETWEEN THE PROVED FACT AND THE PRESUMED FACT.

The truthfulness "presumption" is technically neither a presumption nor an inference. This is because there is no proved fact from which the jury must presume (or may infer) some other fact. However, it may be that the swearing of the witness should be considered the proved fact. Nevertheless, an examination of the law of presumptions and inferences sheds light on the subject.

A. An inference instruction must be supported by a close connection.

Turner v. United States, 396 U.S. 398 (1970), dealt with a permissible inference as opposed to a mandatory presumption. The statute, 26 U.S.C. §4704(a), stating that absence of tax stamps is "prima facie" evidence of distributing drugs not in the original stamped package, was read to the jury. 396 U.S. at 402, 420. The Court's analysis of this "prima facie" rule as a permissible inference, 396 U.S. 419-424, was correct. "Presumption" cases antedating *Turner* all involved permissible inferences rather than mandatory presumptions. *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Tot*, 319 U.S. 463 (1943). These cases hold that at least a "more likely than not" connection is required when the jury is instructed as to an inference.

B. A presumption instruction must be supported by a very close connection.

Although *Leary v. United States*, 395 U.S. 6, 36 n.64 (1969), left open the issue of whether the inferred fact must flow beyond a reasonable doubt (rather than more likely than not) from the proved fact, the reasoning in *Turner* is based upon a reasonable doubt theory. The Section 4704(a) inference regarding cocaine was found faulty because there was a "reasonable probability" that Turner had obtained the cocaine in the original stamped package. 396 U.S. at 423-424. And the Section 4704(a) inference regarding heroin was allowed because there was "no reasonable doubt" that Turner had not obtained it in the original stamped package. 396 U.S. at 421.

Assuming arguendo that *Turner* establishes merely a more likely than not standard for the connection between the proved fact and the inferred fact, a closer connection is required when dealing with a mandatory presumption. The difference between a permissible inference and a mandatory presumption is substantial. An inference instruction tells the jury that it is permitted but not required to reach a particular conclusion. *Turner v. United States*, 396 U.S. 398, 406 n.6 (1970); *United States v. Gainey*, 380 U.S. 63, 70 (1969); McCormick, Evidence §342 at 803-804, §346 at 831 (2d ed. 1972). But a presumption instruction tells the jury that it must reach a particular conclusion. The Naughten jury was told that unless "out-weighed or equaled," "A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence." A. 15-16. Thus, unlike the inference instruction relating to the use of a pistol, A. 15, the jury was *expressly directed* to find that every witness spoke the truth.

If a "more likely than not" connection is required when the jury has discretion to find or not to find an inferred fact, then a "beyond a reasonable doubt" connection must be required when the jury is expressly directed to find a presumed fact.

C. The truthfulness presumption applies to every element of the crime.

The presumption of truthfulness does not point the jury toward finding that any specifically articulated element of the crime was committed. Rather, it points the jury toward finding that each and every element of the crime was committed. For example, a key issue in Naughten's case was the identity of the robber. Both eyewitnesses testified that Naughten was the robber. The jury was expressly directed to believe these witnesses, and so was directed to find that Naughten was the right man. Another example relates to the element of being armed with a dangerous weapon. The two eyewitnesses testified that a pistol was used, although no pistol was ever recovered. The jury was required to believe that a pistol was used, and was further permitted to infer that the pistol was loaded and dangerous. This violates the rule against pyramiding an inference upon a presumption, thus shifting the burden of proof. *Malloy v. United States*, 246 A.2d 781 (D.C. App. 1968); Annot., 5 A.L.R.3d 100 (1966).

D. The law recognizes the tendency of witnesses not to speak the truth.

A century ago, some persons were considered so unlikely to speak the truth they were not permitted to testify at all. 1 Greenleaf, Law of Evidence §327 (13th

ed. 1876) asserts that some persons are incompetent witnesses because it is more likely than not that they will mislead the jury. Very few categories of incompetent witnesses exist under modern law, and most of the old reasons for excluding witnesses have become grounds for impeachment. McCormick, Evidence §61 (2d ed. 1972). The grounds for impeachment are many, and they are expanding. McCormick, Evidence §§33-50 (2d ed. 1972); Fed. R. Evid. 601 ff. (1973). Thus, the law recognizes the vast variety of human frailties which result in inaccurate testimony. Even unimpeached witnesses need not be believed by the trier of fact. *Quock Ting v. United States*, 140 U.S. 417 (1891).

E. Social scientists have demonstrated the tendency of witnesses not to speak the truth.

Studies by social scientists demonstrate the irrationality of presuming that witnesses speak the truth. Marshall, Law & Psychology in Conflict ch. 2 (1966) reports on an experiment in which 291 subjects were shown a 42 second movie. Most subjects thought the movie was more than 90 seconds long (p. 53). One week after the movie was shown, the subjects were asked whether the principal actor wore a light jacket, a dark jacket, or wore no jacket. More than 50 percent of the answers were wrong (p. 56). Similar studies, which demonstrate that eyewitnesses are quite unreliable, are collected and summarized in Gardner, *The Perception and Memory of Witnesses*, 18 Cornell L.Q. 391, 407-409 (1933). Some of the reasons for witness error are discussed in Moore, *Elements of Error in Testimony*, 28 Ore. L. Rev. 293 (1949).

IV.

THE TRUTHFULNESS INSTRUCTION HAS BEEN REJECTED BY MOST AMERICAN STATES WHICH HAVE CONSIDERED THE ISSUE.

Four state courts have specifically ruled that giving a truthfulness instruction in a criminal case is error. In *State v. Taylor*, 57 S.C. 483, 35 S.E. 729 (1900), a rape conviction was reversed because the jury was given a truthfulness instruction. In a well reasoned opinion the court noted that a truthfulness presumption would interfere with the presumption of innocence (that is, reduce the State's burden of proof). *Taylor* was criticized in *State v. George*, 113 S.C. 154, 102 S.E. 284 (1920), but the holding in *George* was simply that it was error to instruct that "There is no presumption that a witness tells the truth." *Hauser v. People*, 210 Ill. 253, 71 N.E. 416 (1904) (burglary convictions affirmed), and *Harris v. State*, 22 Ala. App. 121, 113 So. 318 (1927) (robbery conviction reversed), held that it was proper to refuse to give defendants' proposed jury instruction that unimpeached witnesses are presumed to testify truly; the courts stated that no such presumption existed. In *State v. Jones*, 77 N.C. 520 (1877), the court reversed an assault and battery conviction partly because it was improper to instruct the jury that "it is a rule of law, a presumption that men testify truly and not falsely." 77 N.C. at 521. See also *Sawyers v. State*, 15 Lea 694 (Tenn. 1885).

Other courts have held such instructions improper in civil cases and would probably hold the same in criminal cases. In *State v. Halvorson*, 103 Minn. 265, 114 N.W. 957 (1908) (bastardy action), the court disapproved of an instruction that "It is to be taken for granted that a

witness speaks the truth on the stand . . . ." In reversing a verdict for the State, the court reasoned: "This placed the burden upon the defendant to compel the minds of the jurors to the conclusion that the statement of the complaining witness was false . . . ." 114 N.W. at 958. Closely related instructions caused reversals in *Bradley v. Gorham*, 77 Conn. 211, 58 A. 698 (1904) (action for broker's commission); *Elder Dempster & Co. v. Menge*, 160 Fed. 341 (5th Cir. 1908) (personal injury); *Mullaney v. C.H. Goss Co.*, 97 Vt. 82, 122 A. 430 (1923) (contract).

In four states (plus Oregon) use of a truthfulness instruction in a criminal case has not resulted in reversal.

Calif. Code Civ. Pro. §1847 (West, 1955), repealed by Calif. Stats. 1965 ch. 299 effective 1967, provided:

> "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

In *People v. Hardy*, 271 Cal. App. 2d 322, 76 Cal. Rptr. 557 (1969) (burglary conviction affirmed), a portion of the jury instruction included the statement, "All witnesses are presumed to tell the truth." The court noted that the instructions clearly explained that the jury was the sole judge of credibility, and noted that the instructions itemized the factors affecting credibility listed in Calif. Evidence Code §780 (West, 1966). Because the instruction applied equally to a defense witness, the court determined that it was not "probable that the jury received the impression that they were required to accept the testimony of the prosecution

witnesses." 76 Cal. Rptr. at 563. Apparently no claim was made that the instruction interfered with federal constitutional rights, and the court used a "harmless error" doctrine which would not comply with *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969).

Other California cases indicate that Calif. Code Civ. Pro. §1847 (West, 1955) was used mainly to emphasize that credibility is an issue to be left solely to the jury. 54 Cal. Jur. 2d *Witnesses* §§198-202 at 649-665 (1960) and cases cited; Calif. Evidence Code §780 annotations (West, 1966).

California has clearly rejected the notion that a witness is "presumed" to speak the truth. Comment, Assembly Committee on Judiciary, following Calif. Evidence Code §600 (West, 1966); Comment, Law Revision Commission, Calif. Code Civ. Pro. §1847, 1973 Pocket Part at 9.

Rev. Code Mont. §93-401-4 (1964) is identical to Calif. Code Civ. Pro. §1847 (West, 1955). An instruction modeled after the statute was given in *State v. Dotson*, 26 Mont. 305, 67 P. 938 (1902), but it was not objected to and did not become an issue.

In *State v. Wehde*, 236 Iowa 47, 283 N.W. 104 (1938), defendant's objection to a truthfulness instruction was that it left the jury free to judge the credibility of a State's witness who had been convicted of a felony. By affirming, the court merely refused to keep the witness' testimony from the jury.

In *Cornwall v. State*, 91 Ga. 277, 18 S.E. 154 (1893), the approved truthfulness instruction dealt with the issue of whether witnesses were committing perjury. Also see *Hamilton v. State*, 143 Ga. 265, 84 S.E. 583 (1915) (affirmed without opinion). In *Eidson v. State*, 66 Ga. App. 765, 19 S.E.2d 373 (1942), the court followed

Cornwall. A dissent, 19 S.E.2d at 375-376, argued that the instruction infringed upon the presumption of innocence (that is, reduced the State's burden of proof).

V.

THE TRUTHFULNESS INSTRUCTION HAS BEEN REJECTED BY ALL UNITED STATES COURTS OF APPEALS WHICH HAVE CONSIDERED THE ISSUE.

Of the United States Circuit Courts which have considered the issue, eight have held that the truthfulness instruction has as its effect a shifting of the burden of proof. *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *United States v. Safley*, 408 F.2d 603 (4th Cir. 1969), cert. denied 395 U.S. 983 (conviction affirmed because no objection at trial); *United States v. Evans*, 398 F.2d 159 (3d Cir. 1968); *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967); *Stone v. United States*, 379 F.2d 146 (D.C. Cir. 1967) (conviction affirmed because no objection at trial); *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967); *United States v. Persico*, 349 F.2d 6 (2d Cir. 1965). Other Courts of Appeals have condemned the instruction on other grounds. *United States v. Gray*, 464 F.2d 632 (8th Cir. 1972); *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967).

Some Circuit Courts take the position that if the defendant testifies or presents witnesses, then the burden created by the instruction balances off against both parties. *E.g., Smith v. Cupp*, 457 F.2d 1098 (9th Cir. 1972), cert. denied 409 U.S. 880 (1972); *United States v. Boone*, 401 F.2d 659 (3d Cir. 1968), cert. denied sub nom. *Jackson v. United States*, 394 U.S. 933 (1969); *Harrison v. United States*, 387 F.2d 614 (5th Cir. 1968).

But see *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967). Because Naughten neither testified nor presented witnesses, the effect of the instruction was to aid solely the State.

Some Circuit Courts have refused to reverse convictions when the truthfulness instruction includes a lengthy list of ways the presumption can be overcome. *E.g., United States v. Gray*, 464 F.2d 632 (8th Cir. 1972); *United States v. Boone, supra; United States v. Schwartz*, 398 F.2d 464 (7th Cir. 1968); *United States v. Bilotti*, 380 F.2d 649 (2d Cir. 1967), cert. denied 389 U.S. 944. The instruction given in Naughten's case did not come close to containing the extensive explanations contained in the instructions given in the above cases. In any event, the above cases are wrong. The presumption shifts the burden; no matter how many ways it can be overcome, the burden is upon the defendant.

VI.

THE TRUTHFULNESS INSTRUCTION HAS NOT BEEN A TRADITIONAL PART OF AMERICAN LAW.

The origin of statements that a witness is presumed to speak the truth is cloudy. The presumption is mentioned in 1 Starkie, Law of Evidence 545, 553-556 (7th Amer. ed, from 3d London ed. 1842). Starkie's comments on page 545 make the point that if a witness is not altogether excluded because of incompetence, he will be presumed to speak the truth. All the author meant was that persons who are not incompetent will be permitted to testify. On pages 553-556 Starkie simply says that the jury may be permitted to convict upon the unimpeached testimony of a single witness. Nowhere does the author propose a rule that a jury should be instructed that there

is a presumption of truthfulness. To the contrary, the point is made that credibility is solely a jury question. 1 Starkie, Law of Evidence 539.

1 Jones, Law of Evidence in Civil Cases §12 at 27, and n.9 at 28 (1st ed. 1896) states that "witnesses are presumed to have testified truthfully." The two cases given as authority do not support the point. In *Hewlett v. Hewlett*, 4 Edw. Ch. 7 (N.Y. Ch. Ct. 1839), the chancellor stated that it should not be presumed that in a prior insolvency proceeding the insolvent committed perjury by filing a false account. In *Matthews v. Lanier*, 33 Ark. 91 (1878), an action for rent, the court affirmed a denial of defendant's motion for a new trial. In doing so, the court said that the plaintiff's uncontradicted testimony was presumed true. The two cases stand for two common rules in civil cases: In *Hewlett*, that prior judicial proceedings were regularly conducted; in *Matthews*, that on a motion for new trial the evidence is viewed in the light most beneficial to the prevailing party.

Many decisions contain language that a presumption of truthfulness exists. But such language usually is used to explain other jury instructions, or to explain that an issue on credibility should be decided by the jury rather than by the court. *E.g.*, *State v. Voelpel*, 208 Iowa 1049, 226 N.W. 770 (1929); *Hauss v. Lake Erie & W. R. Co.*, 105 Fed. 733 (6th Cir. 1901); *Crane v. State*, 111 Ala. 45, 20 So. 590 (1896); *Jackson v. State*, 33 Tex. Cr. 281, 26 S.W. 194 (1894); *Johnson v. People ex rel. Peel*, 140 Ill. 350, 29 N.E. 895 (1892); *Comstock v. Rayford*, 12 Smedes & M. 369 (Miss. 1849). Contra, *Engman v. Estate of Immel*, 59 Wis. 249, 18 N.W. 182 (1884) (instruction approved).

Ore. Rev. Stat. §44.370, upon which Naughten's truthfulness instruction was based, derives from a Code

of Civil Procedure adopted October 11, 1862. Deady, Organic & Other General Laws of Oregon, 1845-1864 §673 (1866). The statute has remained practically unchanged since 1862. A statutory revision commission established by the 1949 Oregon Legislature made an unimportant change in the section.

Deady, Organic & Other General Laws of Oregon 1845-1864 at 315 n.1 (1866) indicates that the series of statutes which includes the original predecessor to Ore. Rev. Stat. §44.370 were "condensed and extracted from Greenleaf's Treatise on the Law of Evidence." However, counsel has found no reference to the truthfulness presumption in Greenleaf's Treatise.

The frequent use of the truthfulness instruction in federal courts during the 1960's may be attributed to Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39 (1961). See Inst. No. 2.04 at 51; Instr. No. 3.01 at 67-68. After the instruction was criticized in *Knapp v. United States*, 316 F.2d 794 (5th Cir. 1963), and concurring opinion at 795, Judge Mathes modified the instruction by changing the word "presumed" to read "assumed." Mathes & Devitt, Federal Jury Practice & Instructions §9.01 at 111-112, §72.01 at 396-397 (1st ed. 1965). In the face of mounting condemnation by the Circuit Courts, all references to presumptions and assumptions of truthfulness were omitted in the criminal instruction, but retained in the civil instruction. Mathes & Devitt, 1968 Pocket Part §9.01 at 90, §72.01 at 222. Truthfulness presumptions and assumptions were omitted in the 1970 revision. 1 Devitt & Blackmar, Federal Jury Practice & Instructions §12.01 at 252-254 (2d ed. 1970); 2 Devitt & Blackmar §72.01 at 144-146 (2d ed. 1970).

VII.

IN RE WINSHIP APPLIES RETROACTIVELY.

In Re Winship, 379 U.S. 358 (1970), decided after Naughten's case was tried, applies retroactively. The purpose of the *Winship* rule is to ensure that innocent persons are not convicted. It is inconceivable that any jurisdiction has acted in reliance upon a less stringent rule in criminal cases. Retroactive application will have a de minimus effect on administration of justice.

VIII.

THE TRUTHFULNESS INSTRUCTION DENIES THE RIGHT TO TRIAL BY JURY.

Closely related to the burden of proof standard is the issue who decides whether the burden has been met. By instructing on the truthfulness presumption, the judge rather than the jury decides whether the burden has been met. The effect is the same as a directed verdict for the State. *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967); *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967).

Of the several essential features of a jury trial, *Williams v. Florida*, 399 U.S. 78 (1970), one is that the jury be the sole judge of witness credibility without instructions dictating to them which result to reach.

IX.

THE TRUTHFULNESS INSTRUCTION INTERFERES WITH DEFENDANT'S RIGHT NOT TO BE A WITNESS AGAINST HIMSELF.

One of the ways of overcoming the presumption is "contradictory evidence." Under the facts of this case such evidence could be forthcoming only from Naughten himself. The pressure upon him to testify interferes with his absolute right not to testify at all.

X.

THE ERROR WAS PREJUDICIAL.

A. When the burden of proof is shifted, the error cannot be harmless.

Clearly some error cannot be harmless. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel at trial); *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge). For example, it would be illogical to assert that a double jeopardy violation could be harmless.

As in the case of a denial of counsel at trial, it is impossible for an appellate court to determine the likelihood of whether the jury would have convicted Naughten if the burden of proof had not been placed upon him. In neither *In Re Winship* nor *Cool v. United States* did any Justice assert that the error was harmless.

Unlike a case in which a small amount of illegal evidence was introduced in addition to a massive amount of lawful evidence, in Naughten's case the entire proceeding is tainted by a shift in the burden of proof. If the jury convicted by using a standard of less than reasonable doubt, there is no way to determine whether they would

have convicted had they applied the proper standard of proof.

B. The error was not harmless in this case.

The main factual issue in the State trial was the identity of the robber. The testimony of eyewitnesses Livengood and Weissenfluh filled about one-half the pages of testimony. (Tr. 9-22, 26-70). And a significant amount of the testimony of the two policemen and one detective was identification testimony. (Testimony regarding identity of the robber, his clothing, money taken, and an automobile allegedly used is contained on the following pages of the transcript: 13-15, 16-19, 27-32, 34-40, 43-46, 58-68, 73-77, 79-83, 89-95, 97-108, 110, 113, 118-122, 124-128, 130-131.) The instruction compelled the jury to believe all of the testimony of these witnesses. Petitioner's only real defense (assuming he does not testify) is to argue that the witnesses should not be believed. But the presumption of truthfulness, which is evidence, cannot be overcome by argument.

XI.

THIS CASE IS APPROPRIATE FOR HABEAS CORPUS RELIEF.

Because this case raises claims dealing with the burden of proof, jury trial, and self-incrimination, and involves the integrity of the fact finding process, it is an appropriate case for habeas corpus relief under 28 U.S.C. §§2241-2254. *Schneckloth v. Bustamonte*, ___ U.S. ___, ___ (1973) (concurring opinion of Powell, J.); *Kaufman v. United States*, 394 U.S. 217 (1969).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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Syllabus

CUPP, PENITENTIARY SUPERINTENDENT *v.* NAUGHTEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1148. Argued October 16, 1973—Decided December 4, 1973

At respondent's Oregon criminal trial, the trial judge charged, in accordance with a state statutory provision: "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence or by a presumption." Respondent was convicted and, following exhaustion of his state remedies, brought this federal habeas corpus action. The Court of Appeals, reversing the District Court, concluded that the "presumption of truthfulness" instruction placed the burden of proving innocence upon the defendant and thus did not comport with due process. *Held:* The instruction cannot be considered in isolation and when viewed, as it must be, in the context of the overall charge, in which the trial court twice gave explicit instructions affirming the presumption of innocence and declaring the State's obligation to prove guilt beyond a reasonable doubt, did not so infect the entire trial that the resulting conviction violated the requirements of the Due Process Clause of the Fourteenth Amendment, the challenged instruction having neither shifted the burden of proof to the defendant nor negated the presumption of innocence accorded under state law. *In re Winship*, 397 U. S. 358, distinguished. Pp. 144–150.

476 F. 2d 845, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, post, p. 150.

John W. Osburn, Solicitor General of Oregon, argued the cause for petitioner. With him on the brief were

Lee Johnson, Attorney General, and *Thomas H. Denney* and *John H. Clough*, Assistant Attorneys General.

Ross R. Runkel, by appointment of the Court, 412 U. S. 904, argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Naughten was tried in an Oregon state court for the crime of armed robbery. The State's principal evidence consisted of testimony by the owner of the grocery store that respondent had robbed the store at gunpoint and of corroborative testimony by another eyewitness. In addition, two police officers testified that respondent had been found near the scene of the robbery and that the stolen money was located near his car in a neighboring parking lot. A few items of clothing, identified as belonging to respondent, and the stolen money were also introduced. Respondent neither took the stand himself nor called any witnesses to testify in his behalf.

The trial judge charged the jury that respondent was presumed innocent "until guilt is proved beyond a reasonable doubt," and then continued:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption." App. 16.

The trial judge also instructed the jury as to the State's burden of proof, defining in detail the concept of reasonable doubt; later, at the respondent's request, he gave an additional instruction on the presumption

of innocence.[2] The jury returned a verdict of guilty, and respondent was sentenced to a term in the state penitentiary.

The Oregon Court of Appeals affirmed respondent's conviction, finding that inclusion of the "presumption of truthfulness" instruction in the judge's charge to the jury was not error. The Supreme Court of Oregon denied a petition for review. His state remedies thus exhausted, respondent sought federal habeas corpus relief in the United States District Court for the District of Oregon, asserting that the presumption-of-truthfulness charge shifted the State's burden to prove guilt beyond a reasonable doubt and forced respondent instead to prove his innocence. The District Court noted that similar instructions had met with disfavor in the federal courts of appeals, but observed that "[those] cases [did] not involve appeals from State Court convictions." Recognizing that the instruction was "proper under Oregon law," the District Court stated:

> "In any event, the giving of the instruction did not deprive petitioner of a federally protected constitutional right." [3]

The Court of Appeals for the Ninth Circuit reversed.[4] That court, noting that the instruction in question "has

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[2] The judge also instructed the jury that respondent did not have to testify and that the jury was to draw no inference of guilt from his failure to do so.

[3] Alternatively, the District Court held that assuming there had been error of constitutional proportions in the charge, the error was harmless in view of the overwhelming evidence of guilt. *Harrington v. California*, 395 U. S. 250 (1969). The Court of Appeals, without detailing its reasoning, disagreed, stating that the State had not met its burden of showing that the error was harmless. In view of our disposition of this case, we do not reach that issue.

[4] 476 F. 2d 845, 846 (1972). The court then denied a petition for rehearing by an equally divided vote.

been almost universally condemned" [4] and that Naughten had not testified or called witnesses in his own behalf, went on to say:

> "Thus, the clear effect of the challenged instruction was to place the burden on Naughten to prove his innocence. This is so repugnant to the American concept that it is offensive to any fair notion of due process of law." 476 F. 2d 845, 847.

We granted certiorari to consider whether the giving of this instruction in a state criminal trial so offended established notions of due process as to deprive the respondent of a constitutionally fair trial.

Although the presumption-of-truthfulness instruction apparently became increasingly used in federal criminal prosecutions following the publication of Judge Mathes' Jury Instructions and Forms for Federal Criminal Cases, 27 F. R. D. 39, 67 (1961),[5] the instruction appears to have had quite an independent origin in Oregon practice. The instruction given in Naughten's trial was directly based on § 44.370 of the Oregon Revised

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[4] The court cited nine cases from various federal courts of appeals, all of which had expressed disapproval of the presumption-of-truthfulness instruction. See *United States* v. *Birmingham*, 447 F. 2d 1313 (CA10 1971); *United States* v. *Stroble*, 431 F. 2d 1273 (CA6 1970); *McMillen* v. *United States*, 386 F. 2d 29 (CA1 1967), cert. denied, 390 U. S. 1031; *United States* v. *Dichiarinte*, 385 F. 2d 333 (CA7 1967); *United States* v. *Johnson*, 371 F. 2d 800 (CA3 1967); *United States* v. *Persico*, 349 F. 2d 6 (CA2 1965). See also *United States* v. *Safley*, 408 F. 2d 603 (CA4 1969); *Harrison* v. *United States*, 387 F. 2d 614 (CA5 1968); *Stone* v. *United States*, 126 U. S. App. D. C. 369, 379 F. 2d 146 (1967) (Burger, J.). None of these cases, however, dealt with review of a *state* court proceeding.

[5] Judge Mathes' original instruction was modified in W. Mathes & E. Devitt, Federal Jury Practice and Instructions § 9.01 (1965), and is not included in E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (2d ed. 1970). See *id.*, vol. 1, § 12.01, and accompanying note.

Statutes, a provision first passed in 1862. Only four years ago, the Oregon Supreme Court upheld the validity of the instruction against constitutional attack. *State* v. *Kessler*, 254 Ore. 124, 458 P. 2d 432 (1969). At that time the court noted the extensive criticism of similar instructions in the federal courts of appeals and the possible effect of such instructions on the presumption of innocence. Nonetheless, though the court stated that "it might be preferable not to instruct the jury in criminal cases where defendant does not take the stand that a witness is presumed to speak the truth," it concluded that there was no error in giving the instruction "if accompanied by an explanation of how the presumption can be overcome." *Id.*, at 128, 458 P. 2d, at 435. The Oregon Court of Appeals followed that holding in affirming respondent's conviction in this case.

The criticism of the instruction by the federal courts has been based on the idea that the instruction may "dilute," "conflict with," "seem to collide with," or "impinge upon" a criminal defendant's presumption of innocence;[6] "clash with" or "shift" the prosecution's burden of proof;[7] or "interfere" with or "invade" the province of the jury to determine credibility.[8] In fact, in some cases, the courts of appeals have determined that a presumption-of-truthfulness instruction is so undesirable that the defendant may be entitled to a new trial on that ground alone.[9] A reading of these cases, however, indi-

[6] See, *e. g.*, *United States* v. *Johnson*, *supra*, at 804; *United States* v. *Stroble*, *supra*, at 1278; *United States* v. *Dichiarinte*, *supra*, at 339; *Stone* v. *United States*, *supra*, at 370, 379 F. 2d, at 147.

[7] See, *e. g.*, *United States* v. *Meisch*, 370 F. 2d 768, 774 (CA3 1966); *United States* v. *Birmingham*, 447 F. 2d, at 1315.

[8] See, *e. g.*, *United States* v. *Stroble*, *supra*; *United States* v. *Birmingham*, *supra*.

[9] See, *e. g.*, *United States* v. *Birmingham*, *supra*. However, the instruction given in *Birmingham* was somewhat different from the instruction given here. The jury there was told that the presump-

cates that the courts of appeals were primarily concerned with directing inferior courts within the same jurisdiction to refrain from giving the instruction because it was thought confusing, of little positive value to the jury, or simply undesirable. The appellate courts were, in effect, exercising the so-called supervisory power of an appellate court to review proceedings of trial courts and to reverse judgments of such courts which the appellate court concludes were wrong.

Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no wise commanded by statute or by the Constitution. Thus even substantial unanimity among federal courts of appeals that the instruction in question ought not to be given in United States district courts within their respective jurisdictions is not, without more, authority for declaring that the giving of the instruction makes a resulting conviction invalid under the Fourteenth Amendment. Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruc-

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tion of truthfulness controlled "[u]nless and until outweighed by evidence to the contrary." *Id.*, at 1315. Apparently no additional instruction was given regarding consideration of the manner or nature of the witnesses' testimony or of the witnesses' possible motivations to speak falsely. See also *Johnson*, *supra*.

tion to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States*, 271 U. S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States*, 409 U. S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

The Court of Appeals in this case stated that the effect of the instruction was to place the burden on respondent to prove his innocence. But the trial court gave, not once but twice, explicit instructions affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt. The Court of Appeals, recognizing that these other instructions had been given, nevertheless declared that "there was no instruction so specifically directed to that under attack as can be said to have effected a cure." 476 F. 2d, at 847. But we believe this analysis puts the cart before the horse; the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

This Court has recently held that the Due Process Clause requires the State in criminal prosecutions to prove guilt beyond a reasonable doubt. *In re Winship*, 397 U. S. 358 (1970). In that case the judge, presiding over the trial of a juvenile charged with stealing $112 from a woman's pocketbook, specifically found that the

evidence was sufficient to convict under a "preponderance of the evidence" standard but insufficient to convict under a "beyond a reasonable doubt" standard. *Id.*, at 360 and n. 2. Since the judge found that a New York statute compelled evaluation under the more lenient standard, the defendant was found guilty. This Court reversed, stating that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure," *id.*, at 363, and holding explicitly "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364.

We imply no retreat from the doctrine of *Winship* when we observe that it was a different case from that before us now. There the trial judge made an express finding that the State was not required to prove guilt beyond a reasonable doubt; in this case the State's burden of proof was emphasized and re-emphasized in the course of the complete jury instructions. Respondent nevertheless contends that, despite the burden of proof and reasonable-doubt instructions given by the trial court, the charge as to presumption of truthfulness impliedly placed the burden of proof on him. We do not agree.

Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect "impinge" upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed

to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from *Winship*.

It must be remembered that "review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction." *McNabb* v. *United States*, 318 U. S. 332, 340 (1943). In this case, while the jury was informed about the presumption of truthfulness, it was also specifically instructed to consider the manner of the witness, the nature of the testimony, and any other matter relating to the witness' possible motivation to speak falsely. It thus remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible. Furthermore, by acknowledging that a witness could be discredited by *his own* manner or words, the instruction freed respondent from any undue pressure to take the witness stand himself or to call witnesses under the belief that only positive testimony could engender disbelief of the State's witnesses.

The jury here was charged fully and explicitly about the presumption of innocence and the State's duty to prove guilt beyond a reasonable doubt. Whatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from the giving of the instruction on the presumption of truthfulness is not of constitutional dimension. The giving of that instruction, whether judged in terms of the reasonable-doubt requirement in *In re Winship*, *supra*, or of offense against "some principle of justice so rooted in

the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934), did not render the conviction constitutionally invalid.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Respondent was found guilty of armed robbery and assault, after the jury had been charged, in pertinent part, as follows:

> "The law provides for certain disputable presumptions which are to be considered as evidence.
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> "A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence. *However, since these presumptions are disputable presumptions only, they may be out-weighed or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.*
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> "The law presumes that the defendant is innocent, and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.
>
> *"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.*
>
> "Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt." (Emphasis added.)

A timely objection was taken to the part instructing upon the presumption of truthfulness. In my view

the charge permitted the jury to convict even though the evidence may have failed to establish respondent's guilt beyond a reasonable doubt, and therefore denied respondent due process of law.

The charge directed the jury to find that the State's witnesses had spoken the truth, unless the presumption of truthfulness were "overcome" by demeanor, impeachment, or contradictory evidence. This instruction followed an earlier instruction that a presumption could be rebutted by other evidence which "out-weighed or equaled" the presumption, but that otherwise "the law expressly direct[ed]" that a finding be made in accordance with the presumption. Considered together, these instructions clearly required the jury to believe a witness' testimony until his or her untruthfulness had been demonstrated by evidence making it appear as likely as not that the testimony was false.[1] Since the State's case rested almost entirely upon the testimony of two eyewitnesses and two police officers, see *ante*, at 142, and since respondent neither called witnesses nor took the stand himself, the practical effect of the court's instructions was to convert the State's burden of proving guilt beyond a reasonable doubt to proving guilt by a preponderance of the evidence.[2]

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[1] Due to the structuring of the instructions it is conceivable that the jurors would have understood that, since the presumption of innocence could be overcome only by proof of guilt beyond a reasonable doubt, the presumption of truthfulness could likewise be overcome only by evidence of untruthfulness beyond a reasonable doubt. If the instructions were in fact understood in this manner, the ensuing arguments concerning the unconstitutionality of the instructions would follow *a fortiori*.

[2] The courts of appeals in every circuit have disapproved of presumption-of-truthfulness instructions and have often expressed their objections in terms of constitutional values. See *McMillen* v. *United States*, 386 F. 2d 29 (CA1 1967); *United States* v. *Bilotti*, 380 F.

The reduction of the prosecution's burden of persuasion to a preponderance clearly conflicts with the Due Process Clause guarantee that an accused shall not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970). In *Cool* v. *United States*, 409 U. S. 100 (1972), we held that an "unacceptable risk" existed that the jury might have understood an instruction—that certain defense testimony could properly be considered if found to be true beyond a reasonable doubt—as requiring that the defense testimony be considered *only* if believed beyond a reasonable doubt. *Id.*, at 102 n. 3. Over a dissent which asserted that the Court was parsing instructions and engaging in semantical distinctions without considering the Court's charge to the jury as a whole, *id.*, at 107–108, the instruction was found "fundamentally inconsistent" with our *Winship* decision, since a possibility existed that exculpatory testimony—that would have

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2d 649 (CA2 1967); *United States* v. *Evans*, 398 F. 2d 159 (CA3 1968); *United States* v. *Safley*, 408 F. 2d 603 (CA4 1969); *United States* v. *Reid*, 469 F. 2d 1094 (CA5 1972); *United States* v. *Strobl*, 431 F. 2d 1273 (CA6 1970); *United States* v. *Dichiarinte*, 385 F. 2d 333 (CA7 1967); *United States* v. *Gray*, 464 F. 2d 632 (CA8 1972); the instant case, *Naughten* v. *Cupp*, 476 F. 2d 845 (CA9 1972); *United States* v. *Birmingham*, 447 F. 2d 1313 (CA10 1971); *Stone* v. *United States*, 126 U. S. App. D. C. 369, 379 F. 2d 146 (1967). But the courts have been particularly concerned about the impact that such instructions might have when the defendant has not offered testimony. See *United States* v. *Safley*, *supra*, at 605; *United States* v. *Boone*, 401 F. 2d 659, 661 (CA3 1968); *United States* v. *Evans*, *supra*, at 162; *United States* v. *Dichiarinte*, *supra*, at 339; *Stone* v. *United States*, *supra*, at 370, 379 F. 2d, at 147; *United States* v. *Johnson*, 371 F. 2d 800, 805 (CA3 1967); *United States* v. *Meisch*, 370 F. 2d 768, 774 (CA3 1966). However, even in a situation where the defendant has introduced rebuttal testimony, the impact of the presumption on the parties will be imponderable and not necessarily equal. See *McMillen* v. *United States*, *supra*, at 33.

created a reasonable doubt in the minds of the jurors—had been rejected because not believable beyond a reasonable doubt. *Id.*, at 104. Thus, the evil in *Cool* was the unacceptable risk that jurors would understand the instruction to require that defense testimony be rejected out of hand which, if considered, might have given rise to a reasonable doubt about the defendant's guilt. Respondent suffered no less a constitutional deprivation when, in unequivocal terms, the jury was instructed to accept the statements of prosecution witnesses as true even though the jurors might have entertained substantial and reasonable doubts about the veracity of the testimony—but not sufficient to conclude that it was as likely as not that the testimony was false.

Moreover, the presumption-of-truthfulness instruction itself is constitutionally defective. In *Turner* v. *United States*, 396 U. S. 398 (1970), we approved an inference of "knowledge" from the fact of possessing smuggled heroin, because "'[c]ommon sense' . . . tells us that those who traffic in heroin will *inevitably* become aware that the product they deal in is smuggled," *id.*, at 417; at the same time, we rejected the presumption that possession of unstamped cocaine was prima facie evidence that the drug was not purchased in or from the original stamped container, because a *"reasonable possibility"* existed that the defendant "stole the cocaine himself or obtained it from a stamped package in possession of the actual thief." *Id.*, at 423–424 (emphasis added). In the instant case, common sense does not dictate that a prosecution witness who has sworn or affirmed to tell the truth will *inevitably* do so, and there is surely a *reasonable possibility* that he will fail to do so.[2] Since here no defense witnesses were

[2] The origins of the presumption that witnesses will testify truthfully appear to extend back at least into the 19th century, see

called, the practical effect of the presumption of truthfulness was to permit the jury to find each and every element of the crimes charged without requiring that the elements be proved beyond a reasonable doubt. The presumption itself thus violates the mandate of *Winship* that "every fact necessary to constitute the crime" be proved beyond a reasonable doubt. See *Barnes* v. *United States*, 412 U. S. 837, 854 (1973) (BRENNAN, J., dissenting).

Viewed in the context of the overall charge to the jury, the instructions were no less objectionable. To be sure—as had been the case in *Cool*—the jurors were instructed that guilt must be proved beyond a reasonable doubt. However, they were also directed in effect to ignore certain doubts they might have entertained concerning the credibility of the prosecution's witnesses. Had the instructions concerning the reasonable-doubt standard necessarily *contradicted* the instructions dealing with the burden of proof needed to overcome the truthfulness presumption, the constitutional objection might have been dissipated. But there is, in my view, an "unacceptable risk" that the jury understood the instructions unambiguously to require that they put to one side certain doubts about the credibility of the testimony they had heard and only then determine whether the evidence

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ante, at 144–145, when it was a widely held belief that a willful violation of the oath would expose the witness "at once to temporal and to eternal punishment." T. Starkie, Law of Evidence 29 (10th Am. ed. 1876). In addition, at that time many of the common-law rules of incompetency were applied to disqualify individuals from testifying for reasons which today would merely be grounds for impeachment. See generally 9 W. Holdsworth, History of English Law 177–197 (1926); C. McCormick, Evidence, c. 7 (2d ed. 1972). Since that time, the rationale underlying the presumption has been substantially undercut.

supported a finding of guilt beyond a reasonable doubt.[4] I therefore conclude that the instructions are constitutionally infirm.

In this circumstance, the constitutional error inhering in the instruction cannot properly be viewed as harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). The reasonable-doubt standard reduces the risk that an error in factfinding could deprive an innocent man of his good name and freedom. See *In re Winship*, *supra*, at 363–364. It also impresses the jurors with their solemn responsibility to avoid being misled by suspicion, conjecture, or mere appearance, and to arrive at a state of certainty concerning the proper resolution of the relevant factual issues. Here, the truth-finding function of the jury was invaded and the State's burden of proving guilt beyond a reasonable doubt was diminished. When the reasonable-doubt standard has been thus compromised, it cannot be said beyond doubt that the error "made *no* contribution to a criminal conviction." *Harrington* v. *California*, 395 U. S. 250, 255 (1969) (dissenting opinion). Rather, such an error so conflicts with an accused's right to a fair trial that the "infraction can never be treated as harmless error." *Chapman* v. *California*, *supra*, at 23.

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[4] The majority's reliance on *Boyd* v. *United States*, 271 U. S. 104 (1926), *ante*, at 146–147, is misplaced. There it was found that an "ambiguous" statement in the charge in a criminal case was likely understood in its harmless sense because of additional curative instructions. *Id.*, at 107. The disputed instruction, even if erroneous, concerned a question of law under the Harrison Anti-Narcotic Act not of constitutional dimension, and the Court relied on the fact that a proper objection had not been taken to the charge. See *id.*, at 107–108.